LEGAL ASPECTS OF LANGUAGE BARRIER IN MAINLAND TANZANIAN COURTS

FATMA RASHID KHALFAN

A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY OF THE OPEN UNIVERSITY OF TANZANIA

2018

CERTIFICATION

The undersigned certify that they have read and hereby recommend and approve for acceptance by the Open University of Tanzania a thesis entitled “Legal Aspects of Language Barrier in Mainland Tanzanian Courts” in fulfilment for the degree of Doctor of Philosophy (PhD) of the Open University of Tanzania.

……

Honourable Judge Dr. Benhajj Shaaban Masoud

(Supervisor)

……..…….....

Date

……..…….

Prof. Wilson Hassan Nandwa

(Supervisor)

……..……

Date

COPYRIGHT

DECLARATION

I, Fatma Rashid Khalfan, do hereby declare that this research thesis is my own original work and that it has not been presented for similar or any other degree award at the Open University of Tanzania or any other university.

.....

Signature

.....

Date

DEDICATION

I dedicate this work in its entirety with reverence and affection to my beloved husband Ali, my parents Rashid, Rahma and my dearest sisters Shamim, Raiya and Ilham.

ACKNOWLEDGMENT

Bismillah! I Humbly Thank God for all His Blessings in my entire life.

As I started this journey a few years back, there were individuals who encouraged me to pursue this expedition that I never thought it would have turned out to be the most exciting of all study trips I have undertaken before. I thank them all whole heartedly, particularly, members of the Faculty of Law at the Open University of Tanzania and judicial officers of the Judiciary of Tanzania whom I met and interacted with in the process.

During the journey, my driving was being supervised and guided by Dr Benhajj Masoud, the main supervisor and Professor Nandwa, the second supervisor. Their supervision and guidance were inspirational, motivational and most rewarding to say the least. They respectively took me to the world of "legalese" which I had never explored before and enriched me with their vast experience and skills in research expedition and critical thinking. As I raced under their supervision for the pursuit of accomplishing my tour in a rough terrain, my driving was very fascinating and adventurous. I am content that the tour I have had in this journey has made fruitful and invaluable contribution that will benefit the course for justice and reform of our laws.

As I was driving and eager to safely arrive at my destination, the vehicle was being refuelled by the best health bestowed on me by the Almighty and the affectionate love and passionate support I got from my beloved husband Ali Takadir whom I cherish much. My momentum for the journey was maintained by prayers,

unconditional love and encouragement I immensely received from my lovely Mum (Rahma) and Dad (Rashid) and my beautiful sisters; Shamim, Raiya and Ilham. They all mean a lot to me.

Alhamdulillah! I thank you all very much. God Bless you All.

ABSTRACT

Language is the oxygen of law and a core foundation for justice. As a medium of accessing justice, language use in trials is in international instrument jurisprudence reflected in "language fair trial rights." The languages applied in Tanzanian courts are Kiswahili and English. English is predominantly a language of law, courts and court record whilst Kiswahili is marginally restricted to the Primary Courts and to a great deal of all court room communications. Language used in courts is the "lawyers' language" referred to as "legalese" which needs interpretation even for lawyers. This is inimical to the interest of justice, particularly to unrepresented laypersons. Addressing the inherent language barrier in Mainland Tanzanian courts, this study employs doctrinal methodology, which is complemented by empirical method. As a result, materials were obtained and analysed for this study against the backdrop of the research questions. By uncovering how language barrier manifests itself in courts, this study opens up dialogue on the role of language in justice administration and the need for prioritising "language fair trial rights." If parties have difficulties in understanding the language of the court, their right to fair trial is likely to be prejudiced, unless there are in place effective and adequate means to overcome language barrier. Yet, the existing court interpretation regime is in many respects wanting and it is at best restricted to criminal and probate proceedings. Other means are also not without deficiencies. This study provides an insight into the magnitude of language barrier with its legal implications in accessing justice and the means available in addressing it. Hence, there is an urgent need for a systematic change in language use in Mainland Tanzanian courts.

TABLE OF CONTENTS

LIST OF CASES

Marwa Kachanga'a v The Republic Criminal Appeal No. 84 of 2015, Court of Appeal of Tanzania, Dar es Salaam (unreported).

Mawazo Makiwa v. Republic, Criminal Appeal No. 45 of 2013, High Court of Tanzania, Dar es Salaam (unreported).

Melita Naikiminjal and Loishilaari Nakiminjal v Sailevo Loibangu [1998] TLR 120.

Michael Luhayo v Republic [1994] TLR 181.

Moses Mayanja @Msoke v Republic Criminal Appeal No. 59 of 2009 Court of Appeal of Tanzania, Mwanza (unreported).

Mpemba Mponeja v Republic Criminal Appeal No. 256 of 2009 Court of Appeal of Tanzania, Mwanza (unreported).

Musa Mwaikunde v Republic [2006] TLR 387.

Nassoro Yahaya Mkondo v Sangaiya Mainge Criminal Case No. 24 of 2014, High Court of Tanzania, Tanga (unreported).

Ó Beoláin v Fahy [2001] 2 I. R 279.

Qaiti Hawai v Kilimanjaro Heria, Criminal Case No. 292 2008, Court of Appeal of Tanzania, Arusha, (unreported).

Ozurt v The Federal Republic of Germany, 21 February 1984.

Paulo Osinya v Republic (1959) EA 353.

Powel v Alabama, 287 US 45, 53, SCT, 56, 77 L ED 158(1932).

Paul Kelly v Jamaica Communication No. 253/1987, UN. Doc CCPR/C/41/D/253/1987 at 60(1991).

Rafael Marques de Marais v Angola, Communication No. 1128/2002, UN. Doc. CCPR/C/83/D/1128/2002(2005

Ramadhani Nyoni v M/S Haule & Co. Advocates [1996] TLR 71

LIST OF CONSTITUTIONS AND LEGISLATION

The Basic Rights and Duties Enforcement Act, 1994, Cap. 3 R.E 2002

The Civil Procedure Code, Cap. 33 R.E 2002

The Commission of Human Rights and Good Governance Act, 2001, Cap. 391 R.E 2002

The Constitution of the United Republic of Tanzania of 1977, Cap. 2 R.E 2002

The Constitution of Zanzibar of 1984

The Criminal Procedure Act, Cap. 20 R.E 2002

The Evidence Act, Cap. 6 R.E 2002

The High Court (Commercial Division) Procedure Rules, 2012 (G.N 250 of 2012)

The Interpretation of Laws Act, Cap. 1 R.E 2002

The Judicature and Application of Laws Ordinance, 1961

The Judicature and Application of Laws Act, Cap. 358 R.E 2002

The Language of Court Rules, GN No. 115, 1981

The Language of the Courts Rules, GN No. 307, 1964

The Law of Marriage Act No.5 of 1971, Cap. 29 R.E 2002

The Magistrates' Courts Act, 1963

The Magistrates' Courts Act, 1984, Cap. 11 R.E 2002

The National Election (Election Petitions) Rules, GN No. 447, 2010

The National Election (Election Petitions) (Amendment) Rules, GN No.106, 2012

The Oaths (Judicial Proceedings), and Statutory Declarations Act, Cap. 34 R.E 2002

The Penal Code, Cap. 16 R.E 2002

The Primary Court Criminal Procedure Code, Cap. 11 R.E 2002

INTERNATIONAL LAW INSTRUMENTS AND POLICIES

The American Convention on Human Rights, 1969

The International Covenant on Civil and Political Rights, 1966

The International Convention on Social, Cultural and Economic Rights, 1966

The UN Convention on the Elimination of All Forms of Discrimination against Women, 1979

The UN Convention on the Rights of the Child, 1989

The Universal Declaration of Human Rights, 1948

The National Education Policy of the United Republic of Tanzania 2014

LIST OF TABLES

LIST OF FIGURES

LIST OF ABBREVIATIONS AND ACRONYMS

AAP	Association of American Publishers
ACHPR	African Charter for Human and Peoples' Rights
AGM	Annual General Meeting
AHRLR	African Human Rights Law Reports
All E.R	All England Reports
ASP	Afro- Shiraz Party
AU	African Union
BA	Bachelor of Arts
BAKITA	Baraza la Kiswahili la Taifa
BPIJ	Basic Principles of the Independence of Judiciary
CAP	Chapter
CA	Court of Appeal
CAT	Court of Appeal of Tanzania
CCM	Chama Cha Mapinduzi
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CHAKA	Chama Cha Kiswahili Cha Afrika
CHAKAMA	Chama Cha Kiswahili Cha Afrika Mashariki
CPA	Criminal Procedure Act
CPC	Civil Procedure Code
CRC	UN Convention on the Rights of the Child
DPP	Director of Public Prosecutions
EA	East Africa

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
Eds	Editors
EHRR	European Human Rights Reports
EWCA	East West Court of Appeal
GLR	Great Lakes Regions
G.N	Government Notice
HC	High Court
ICCPR	International Convention of Civil and Political Rights
ICSCER	International Convention on Social, Cultural and Economic Rights
IR	Irish Law Reports
ITIA	Irish Translators and Interpreters Association
JALA	Judicature and Application of Laws Act
LHRC	Legal Human Rights Centre
LLM	Masters of Law Degree
LPELR	Law Pavilion Electronic Law Report
LRCT	Law Reform Commission of The United republic of Tanzania
LRT	Law Reports of Tanzania
LTD	Limited
MCA	Magistrates' Courts Act
NC	North Carolina Court of Appeals
NGO	National Governmental Organization
No	Number
OAU	Organisation of African Unity

P	Page
PC	Primary Courts
PM	Prime Minister
PP	Pages
RE	Revised Edition
SACR	South African Criminal Law Reports
SC	Cape Supreme Court Reports
SCCL	Supreme Court of Canada
SCR	Supreme Court Reports
SUPP	Supplementary (Law Reports)
SMZ	(*Serikali ya Mapinduzi ya* Zanzibar) The Revolutionary Government of Zanzibar
TANU	Tanganyika African National Union
TANZALII	Tanzania and Zanzibar Legal Information Institute
TATAKI	Taasisi ya Taaluma ya Kiswahili
TBC	Tanzania Broadcast Corporation
TGCL	Tanzanian-German Centre for Postgraduate Studies in Law
TLR	Tanzania Law Report
TUKI	Taasisi ya Uchunguzi wa Kiswahili
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Economic Social and Cultural Organization
UWAVITA	Umoja Wa Waandishi Wa Vitabu

V	Versus
VOL	Volume
WLR	Weekly Law Report
WSD	Written Statement of Defense
ZNZ	Zanzibar

CHAPTER ONE

1.0 THE CONTEXT OF THE STUDY

1.1 Introduction

Kiswahili and English languages are two main official languages used in Tanzanian courts.[1] Although Kiswahili is also the national language,[2] English language is the one which is officiated in a wider judicial spectrum.[3] There have been arguments surrounding the role played by language use in the delivery of justice system.[4] The central argument is that language as a means of communication constitutes a powerful medium for the construction and transmission of legal and procedural message between adjudicators and court's clients.[5]

This study focuses on the use of language as a medium of communication in the courts of law and the challenges it poses in accessing justice in Tanzania.[6] Being the first chapter in this study, it provides background information on the language used in the process of justice administration in Mainland Tanzanian courts. Furthermore, the objectives of the work are examined followed by literature review and methodological aspects of the study.

---

[1] Magistrates' Courts Act [Cap 11. R.E 2002], s 13.

[2] See generally National Education Policy of the United Republic of Tanzania 2014.

[3] Interpretation of Laws Act [Cap. 11 R.E 2002], s 84; n 1; Language of Court Rules, GN 115 of 1981; and Language of the Courts Rules, G.N. No. 307 of 1964.

[4] See for example, Namakula, C. S. Language and the Right to Fair Hearing in International Criminal Trials, Springer, London, 2014; Karton, J., *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, Vanderbilt Journal of Transnational Law, 2008, Vol. 41, No. 1, 1-54; Wanitzek, U. and Twaib, F. , *The Presentation of Claims in Matrimonial Proceedings in Tanzania: A Problem of Language and Legal Culture*, AAP, 1996, Vol. 47, 115-137; Mazrui, A., *Language and the Rule of Law: Convergence and Divergence*, www.language and the rule of law.pdf-adobe (accessed 12/08/2015).

[5] This includes accused persons, plaintiff, respondents and attorneys.

[6] It is provided for under the provisions of section 13 of Magistrates Courts Act [Cap. 11 R.E 2002] that, English Language shall be the recording language for all proceedings from District Court and Resident Magistrates' Courts. Kiswahili language is used in the Primary Courts.

1.2 Background of the Study

The notion of access to justice is both a human and constitutional right within the Tanzania legal system.[7] The latter is based on the common law system which has been adopted if not inherited from the British colonial power since 1920.[8] Tanganyika got its independence from the British government which was vested with power to administer Tanganyika as a mandate territory.[9] After independence in 1963, the laws of Tanzania[10] legitimised categorically that English should be the language of records in all courts save for Primary Courts. As a result, the use of English language termed as the *de jure* language continues to be used in court proceedings and recordings, causing many individuals to be stuck in a nightmare when they go to court to protect their children, lives, home, safety and their properties. This is because such individuals can neither understand nor communicate what is happening given their limited knowledge of the English language or a complete lack of English knowledge. It is indeed disastrous and extremely challenging to ordinary people to pursue for justice using the English language which reigns in the court precincts.[11]

---

[7] Peter, CM Human Rights in Tanzania: Selected Cases and Materials, Rudiger Koppe Verlag Koln, Dar es Salaam, 2000, p.304.

[8] Through the Foreign Jurisdiction Act 1890 the basic provisions for the government of Tanganyika as a British dependency were made by the Tanganyika Order in Council 1920. A. Grieken, A., Language and Power in the Courts of Tanzania: A Critical Discourse Analysis of 30 Land Case Judgments, PhD Thesis, University of Dar es Salaam, Tanzania, 2008, p.24; Legal and Human Rights Centre, Tanzania Human Rights Report, Dar es Salaam, 2012, p.9, www.humanrights.or.tz (Accessed 6/10/2013).

[9] This was on 9th day of December, 1961. It should be noted here that, before independence, Tanganyika was colonised by Germany. This was from 1914 to 1919 followed by British from 1920 up to 8th December, 1961

[10] The Magistrates' Courts Act 1963. This law was repealed and replaced in 1984 by Act No 9 of 1984 and also revised in 2002. See n. 1.

[11] Othman, M.C., A Keynote Address by Honourable Chief Justice of the United Republic of Tanzania on the occasion of the Annual Conference of the Tanganyika Law Society, Arusha, 17/02/2012,<https://www.scribd.com/document/112948089/CJ-Speech-AGM>(Accessed 01/012013).

Strictly speaking, different studies reveal that Kiswahili is currently spoken by the majority of Tanzanian population. However, some of the Tanzanian parliamentarians at one time demanded passing of a bill which would extend the use of English language in Primary Courts despite the skepticism of some members of parliament as to the feasibility of such a proposition.[12] If such a bill were passed, English language would be given more attention and the use of Kiswahili language would completely be ousted from the courts. In addition, the argument submitted before the National Assembly is that many people in Tanzania have knowledge of English language. However, such a claim lacks evidence to support it.[13]

In practice, Kiswahili is the *de facto* language of most institutions,[14] which is normally switched into for clarity. It is the language spoken by almost every resident in Tanzania uniting more than one hundred and twenty (120) tribes existing across the country.[15] It can therefore be argued that, the use of Kiswahili in court proceedings will enhance disposal of cases and accessibility to justice.[16] It is common knowledge that creativity and innovative thinking is a result of using one's own native language.[17] English as a language of law and courts in Tanzania emerged during the colonial era. It was used as a condition in judicial proceedings because the majority of the presiding magistrates in District Courts and High Court

[12] The Attorney General while giving his submission on the bill stated "We don't remove Kiswahili but we say English language should also be used and the Tanzanians have the knowledge of English language……" Broadcasted in TBC (Tanzania Broadcast Corporation) on 8/02/2013.
[13] Ibid
[14] Saffari, A. J., Prosecution and Defence of Criminal Cases, Huda Publishers, Dar es Salaam, 1996, pp.92-93.
[15] Legal and Human Rights Centre, Tanzania Human Rights Reports 2009, Dar es Salaam, 2010, p. 20.
[16] The Primary Courts which use Kiswahili as the language of court proceedings and record are widely acknowledged for speedy disposal of cases.
[17] Examples are always cited of countries such as Germany, Japan, China and Russia which have advanced despite using their own language.

at the time were British colonialists undoubtedly conversant with English language and it was not intentionally found necessary for them to learn Kiswahili. Nevertheless, the British enacted the Native Courts Ordinance, which selected native court (Kadhi, liwali, akida, chief and headman) which used Kiswahili. Such native courts were subordinate to the High Court.[18] Despite the fact that there are no longer any British judicial officers presiding over the Tanzania courts, English has predominantly remained the language of the court. In spite of the predominant use of English, the courts lack professional interpretation facilities readily available at the disposal of the judicial officers and court room communication.[19]

As most people in Tanzania are not native speakers of English language barrier is unquestionably inherent when court proceedings are conducted in English or in Kiswahili and instantly translated into English. This is not only the case for ordinary people and in particular laypersons having matters before the court, but also for some advocates, magistrates and judges. As Tanzania is a multilingual country, language barrier may also potentially arise if one party does not understand Kiswahili but understands one of the local tribal languages spoken in the country. From the jurisprudential line of reasoning, language barrier has the potential of affecting court room communication and transmission of legal information which may lead to violation of principles of natural justice.[20] On the other hand, it has been

[18] No.6 of 1920 of the Laws of Tanganyika.

[19] This can easily be observed in any court room that one attends or visits. See also Mwakajinga, A. N., *Court Administration and Doing Justice in Tanzania*, in Jones-Pauly, C., and Elbern, S.(eds), Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts, Kluwer Law International, London, 2002, pp.231and 233.

[20] Namakula, C. S. (n. 4) 5 and 7; Lubbe, H.J. , *The Right to Language in Court: A Language Right or a Communication Rights?* https://dialnet.unirioja.es (Accessed 18/11/2017). See also article 13(1) of The Constitution of the United Republic of Tanzania of 1977(as amended from time to time). Universal Declaration of Human Rights, 1948.

argued that the law is a subject matter that will remain arcane even if it is taught in the language known by the majority. It is a profession that will remain known in its required standard by those who have acquired skills during their course of studying.[21]As such, language barrier is not *per se* inherent in language use as a distinctive communication tool, but it is in the character of the profession itself and the skills acquired in the very profession.

1.3 Statement of the Problem

The problem that this study seeks to address is the inherent language barrier in accessing justice in Mainland Tanzanian courts and its attendant legal aspects. The problem is multidimensional. On one hand, it is inherent in the persistent and predominant use of English language as a language of law, court and court records whilst the use of Kiswahili is marginally restricted to the Primary Courts and a great deal all court room communication. On the other hand, it is inherent in the complicated co-existence of the two languages in the court proceedings albeit in different context and status.

Indeed, when proceedings are conducted in Kiswahili and instantly taken, translated and recorded in English the problem of the instant translation is always left to the presiding judicial officer who may neither be an expert in that aspect nor well facilitated, to carry out the translation obligations. The latter is consistent with the fact that legal education and training do not expose judicial officers and lawyers to language translation and interpretation. It is also common place that communication

[21]This argument was contended by Mukuyogo, M. C., *Can Law be Taught in Kiswahili?* Eastern African Law Review,1991, Vol.18, Issue No.2, pp. 55-81.

skills courses offered in most universities for law students do not aim to impart skills for language translation and interpretation to law students.

With reference to courts other than Primary Courts, the proceedings can be conducted in Kiswahili or English although they are mainly conducted in Kiswahili and instantly translated to English. As such, the evidence received in the proceedings, rulings and judgment given and other records of such courts are all recorded in English language. However, sometimes, judgments and rulings written in English language, can be read in Kiswahili if parties are unrepresented or do not comprehend English language.[22]

Judicial officers seem to face significant challenges during the trial process involving listening, instant translation and manual recording in English what has been stated by the parties and their witnesses, in Kiswahili. This process potentially contributes to delay of cases and miscarriage of justice. Language inaccuracy of a statement such as misquoting or mistranslating or misinterpreting correct meaning of words from Kiswahili to English may eventually jeopardise access to justice and justice delivery.[23]

In one example a traffic case discussed by Saffari, the magistrate recorded the word 'mud' instead of 'dust' because he could not differentiate the two words.[24] It could be also because the magistrate could not find the right vocabulary in English language as he was instantly translating and recording from Kiswahili to English.

[22] Wanitzek and Twaib (n 4) 117-124.
[23] Ibid p. 116.
[24] Saffari, A. J. (n 14) 93.

Additionally, it has been frequently observed that aggrieved parties by the decision of the court who are not represented by an advocate fail to appeal because they cannot submit their appeals in English. Thus, language barrier is a major problem when such people attempt to navigate the court system.

1.4 Significance of the Study

This study opens dialogues and discussions on the role played by language in accessing justice in Mainland Tanzanian courts. Hence, the study is of significance to law makers, academicians, students, judicial officers and the general public at large. Overall, the study provides an in-depth understanding and insight into the magnitude of the problem of language barrier with its implications in accessing justice.[25]A better understanding of the problem is fundamental in considering what needs to be done to improve the judicial process in justice delivery.

1.5 Objectives of the Study

The general objective of this study is to explore how inherent language barrier manifests itself and affects the process of justice delivery in Mainland Tanzanian courts. The study is specifically premised in the following objectives:

i. To examine the legal regime that governs language use in courts.

ii. To examine means that are in place to overcome language barrier in courts

iii. To examine instances and implications of language barrier in accessing justice in courts of law.

[25] Shivji, I.G., *Law and Access to Justice: Rhetoric and Reality* East African Journal of Peace and Human Rights, 2001, Vol.7, Issue No.1, pp.55-81.

iv. To examine language barrier that judicial officers face in conducting court proceedings and in determining cases.

v. To examine problems that flow from the co-existence of English and Kiswahili as languages of court proceedings.

1.6 Research Questions

The following research questions were designed to guide the development of this study:

i. What is the legal regime that governs language use in courts?

ii. Are there sufficient and effective means designed to overcome language barrier in court proceedings?

iii. What are instances and implications of language barrier in accessing justice in courts?

iv. What language barrier do judicial officers face in conducting court proceedings and determining cases?

v. What problems flow from the co-existence of English and Kiswahili as languages of court proceedings?

1.7 Literature Review

The review of literature undertaken in this study reveals that, there are several studies and writings by scholars from linguistic, education and law which to some extent address the subject of this study. Generally, scholars from linguistics and education seem to advocate for the use of Kiswahili in teaching as a solution for quality education in Tanzania. Similarly, there are legal scholars who argue in favour

of using Kiswahili as the sole language of the law and courts. They view the proposal as an urgent measure that has to be taken for public interest.

Undoubtedly, the proposal centres on the need to address the inherent language barrier. The proposal looks at the use of English language as the source of language barrier, because the majority of the people in Tanzania are not conversant with English. Scholars who subscribe to this proposal seem to think that the use of Kiswahili is a panacea to language barrier. Scholars who argue that the use of Kiswahili in court will eliminate language barrier and enhance access to justice include Saffari, Rwezaura, and Mazrui. The respective works of these authors are a subject of review in this study.

There is also another scholarship which addresses the language barrier whose main proponent is Mukoyogo. This scholarship argues that the problem of language barrier in courts is not an issue of which language is used between English and Kiswahili. Rather, it is an issue which is inherent in the law as a specialised profession. According to this scholarship, language barrier would persist regardless of the language used because of the nature of law and the specificity of its language.

The other category of the existing scholarship relating to language barrier is that which addresses language barrier as a problem focusing on specific aspects without necessarily confining itself to the debate between the use of English against Kiswahili or any other vernacular language of a given country or the use of Kiswahili or any other vernacular language of such country against English. Scholars who subscribe to this scholarship seem to discuss the problem and how it affects

access to justice. They include Mwakajinga; Wanitzek and Twaib; Karton; Ndumbaro; Hussein; and Namakula whose respective works are herein reviewed. A few of these scholars, such as Namakula, Karton and Michael, look at language barrier from international criminal justice point of view. Yet, there are a handful of scholars reviewed herein whose works are not directly on language barrier although they address aspects that are relevant to the discourse of language barrier. Such scholars include Twaib and Possi.

With regard to those who look at language barrier as one that can be solved by using Kiswahili as the language of the law and the court, Saffari in his article titled "Ufundishaji Wa Sheria Kwa Kiswahili",[26] is worth noting. Saffari's contribution in this article states that law could be taught in Kiswahili only if there would be adequate teaching facilities. As he underscores the teaching of law in Kiswahili, Saffari considers Kiswahili as a weapon for social and economic development. Nevertheless, Saffari did not specifically elucidate on the advancement of science and technology in relation to Kiswahili language and the adequate facilities required by judicial officers during proceedings in courts. The availability of adequate facilities is also an issue that this study discusses.

In another work Saffari attempts to contribute in Kiswahili to the existing legal literature. The book written in Kiswahili[27] and translated in English aims at teaching people the law on prosecution and defence.[28] In this book, Saffari clearly expounds

[26] Masabo, T., Kiswahili Katika Elimu, Taasisi ya Uchunguzi wa Kiswahili, Dar es Salaam, 1999, p 54.
[27] Saffari, A. J., Mashtaka ya Jinai na Utetezi.UWAVITA, Dar es Salaam, 2006.
[28] Saffari, A. J. (n 14) 91.

on the continuous pressure for the demand of using Kiswahili in courts of law. He contends that during the colonial era all judges were colonialists which meant that there was need for using English language because they were not conversant with Kiswahili.

Likewise, Rwezaura in his two pieces of literature titled "Why Kiswahili Should be the Medium of Instruction"[29] and "Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania,"[30]advocates for the use of Kiswahili in legal education and in courts of law. He enlists constraining factors, which have contributed to the failure of the adoption of Kiswahili as the language of law in Tanzania. These include language of legal education, failure of the government to encourage use of Kiswahili as the language of law, and allocation of insufficient resources.

Despite Rwezaura's good contribution, it is over twenty years (20) now since the literature was written and significant changes have since taken place. These changes could be added to those factors contributing to the failure to adopt Kiswahili. This includes the re-establishment of the East African Community in which there is cross-border activities involving citizens of member states, some of whom have limited understanding of Kiswahili. Rwezaura also made an effort to explain the law of marriage in Tanzania in Kiswahili by writing a Kiswahili book titled "Sheria Ya

[29] Rwezaura, B., *Why Kiswahili Should be the Medium of Instruction*, in Zaline, M., Roy-Campbell, M., and Martha, A., Language Crisis in Tanzania, Mkuki na Nyota Publishers, Dar es Salaam, 1997, p. 124.

[30] Rwezaura, B., *Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania*, African Law Journal, 1994, Vol. 37, pp. 30-45.

Ndoa Tanzania." This book sought to ensure that people in Tanzania understand the law of marriage without encountering any language barrier.[31]

On his part, Hussain in his article titled "Language Challenges Faced by Tanzanian Law Students to Communicate in English,"[32] seems to look at language barrier from the perspective of the problems that law students in Tanzania have in English. He argues that the main challenges facing law students in Tanzania are English grammar, vocabulary, pronunciation, cultural background, fluency, shyness, lack of active listening, stage of fear and apprehensive communication. He argues further that the main weapon for lawyers to battle in courts is "words" as is "bullets" for soldiers with which this study concurs with. In his view, English language is pertinent for the future career of the law students who are the future judicial officers and advocates and maybe litigants. However, the author did not analyse how these challenges could in practice lead to miscarriage of justice due to language barrier which this study underpins.

Mukuyogo is one and perhaps the only scholar who looks at language barrier from a different perspective as shown above. He explains language barrier from the Tanzanian context as one that has nothing to do with the debate between the use of English and Kiswahili as language of the law and court. He argues that law is a subject matter that will remain arcane even if it is taught in Kiswahili. He does not address the complexity of the dominance of English language in courts as a language

[31] Rwezaura, B., *Sheria Ya Ndoa Tanzania*, Taasisi ya Uchunguzi wa Kiswahili, Dar es Salaam, 1981, p.1.
[32] Mohammed, H., *Language Challenges Faced By Tanzanian Law Students to Communicate*, English India's First Magazine on Legal and Corporate Affairs, 2012, p. 3.

of court record.[33] He maintains that the problem is more so in the nature of law and the specificity of its language than otherwise. Clearly, Mukoyogo looks at the language barrier beyond the debate of Kiswahili versus English. It is Ndumbaro who addresses the complication of using English as a dominant language of the courts.[34] He mainly argues that the complication is based on the fact that many people in Tanzania are not very conversant with English. Ndumbaro does not associate himself with the debate of Kiswahili versus English. He looks at language barrier from the perspective of the stance that English is only understood by a few people in Tanzania.

In his book titled *The Legal Profession in Tanzania: The Law and Practice*, Twaib discusses the law and practice relating to the legal profession. This work is one of such literature that addresses aspects that are relevant to language barrier discourse although it does not specifically address the problem. Of significance, Twaib flags out the shortcomings inherent in the present professional regime which contributes to the profession's failure to be adequately responsive to the needs and expectation of clients and the society in general. Twaib argues for urgent reform on the professional legal regime. In so doing, he quotes Tweed who once noted.

> *A person who chooses the Bar as a career must be feeling the call to higher office. If he is to fulfil that call he needs a much more liberal and sophisticated type of education than the Law Faculties provide. It is the business of the practising Bar to provide him with that type of further education.*[35]

[33] Mukuyogo (n 21) 55-81.

[34] Ndumbaro, D., 'Free Access to Law in Tanzania: A Myth or Reality?' www.docstoc.com/docs/27594233/FREE-ACCESS-TO-LAW-IN-TANZANIA-A-MYTH-OR-RELAITY-By-Damas-Daniel-Ndumbaro-Esq-A-paper-to-be-presented-to-the-seminar-on-Law-via-Internet-to (Accessed 12/11/2014).

[35] See Tweed, H., *The Continuing Education of the Complete Lawyer*, Wash Univ L.Q., 1960, Vol. 4, p. 317, quoted in Twaib, F., The Legal Profession in Tanzania: The Law and Practice, Eckhard Breitinger, Bayreuth, 1997, p.159.

Reflecting on the above quotation, Twaib notes that in Tanzania there is a gap between academic and practical legal education. He therefore recommends that the gap needs to be filled if the profession is to grow at a healthy rate for the betterment of both the profession itself and better administration of justice in the country. Whilst Twaib recognises the inherent need for further education he fails to explicitly identify language use proficiency and language soft skill demands as among such areas that the legal profession needs to be exposed to and understand the inherent language barrier in legal practice. It could be argued however that, the author meant to include language use proficiency and soft skill demand as among areas that the legal profession needs to be exposed to.

However, much as Twaib's work does not specifically and explicitly identify the legal significance of language use for the betterment of the profession and betterment of administration of justice, his recognition that the profession requires "a much more liberal and sophisticated type of education than the law schools provide" is an indication that he is cognisant of various types of the needed knowledge including the language use that the profession must be acquainted to. Twaib's work is helpful in the present study as it provides the legal regime within which the legal profession operates and the challenges the legal profession faces, which might arguably include the language use and its resulting language barrier. Theoretically and practically, the work is relevant to the present study.

Although Twaib did not explicitly discuss language use and language barrier in the above work, in his article which he co-authored with Wanitzek titled "The Presentation of Claims in Matrimonial Proceedings in Tanzania: A Problem of

Language and Legal Culture," the issues are to a significant extent addressed. The article makes a fair contribution in the language barrier discourse in Tanzania. In this work, the authors highlight the problem of language and how it affected presentation of matrimonial claims in courts and their adjudication. They also show how the hegemony of English language is apparent in most of pieces of legislation in Tanzania, which are drafted in such language.

Although there are few pieces of legislation, which are drafted in Kiswahili, some judicial officers are not aware of their existence. For this reason, they make mistakes in translating and interpreting words narrated by the parties.[36] This work focussed on language problems in presentation of matrimonial claims. However, the work is hugely relevant to the present study. It provides a particular insight into the challenges of the complicated co-existence of English and Kiswahili as languages of the court. Looking at the problem in its wider dimension, this study divulges on the legal regime for language use in Tanzania and on different civil and criminal cases concerning language barrier in accessing justice.

There are two theses which address language barrier from a linguistic point of view.[37]Since these works have been written from the linguistic perspective, they completely ignore the legal perspective which is crucial in understanding miscarriage of justice that litigants and accused persons suffer due to language barrier. While Van Grieken's work analyses linguistic aspects of several judgments

[36] Wanitzek, and Twaib (n. 4) 117-124.

[37] Van Grieken, A. M., 'Language and Power in the Courts of Tanzania- A Critical Discourse of 30 Land Case Judgments' PhD Thesis, University of Dar es Salaam, Tanzania, 2008; and Charamba, T. "Challenging the Hegemony of English in Post- Independence Africa-An Evolutionist Approach', PhD Thesis, University of South Africa, South Africa, 2012.

of land cases, Charamba's work deals with language problem from a linguistic perspective.

Mwakajinga falls into the category of scholars who look at language barrier as a problem without necessarily associating it with the debate of the use of English versus Kiswahili.[38] He discusses the language of the court and the law. Without analysing the law, Mwakajinga argues that the law does not specifically provide how court record should be taken during court proceedings. He further reflects on the practice relating to taking and recording of court proceedings. He describes the practice as one that involves a judicial officer recording the protocols in a case file by hand writing and later the proceedings are typed. He identifies the challenges that a judicial officer face during court proceedings. He singles out the challenge of listening and writing simultaneously which a presiding judicial officer faces whilst he is at the same time expected to be succinct, reasonably fast and accurate in writing and be quick in sorting out relevant facts from evidence. In his view, the current practice is conducive to errors, omissions or irregularities, which may amount to injustice.

The other challenge that he discusses is one that relates to interpretation. He mentions the problems of getting competent court interpreters and the risk of the court being misled by an interpreter who creates or has interests of his own to serve in the case. Considering the challenges and the potential of miscarriage of justice to accused and litigants due to language barrier as aforesaid, Mwakajinga recommends that it is high time the proceedings are taped or even video-taped so that in case of

[38] Mwakajinga (n 19) 231-234.

error or omission, the tape will clarify the matter. Mwakajinga's work concurs with the present study's focuses on language barrier discourse. However, Mwakajinga's work did not conduct an in-depth analysis of the law and the practice, which are explored in the present study. Nevertheless, Mwakajinga provided an insight that helped the present study to carry further and develop the scholarship that his work pursued.

The other author who contributed in language barrier discourse is Michael in his article entitled "Communication of An Interpreter and Fair Trial under Nigerian Criminal Justice System."[39] The author discusses and reveals the significance of having an interpreter and translator for an accused as a precondition for fair trial in criminal justice system in Nigeria. This is in respect of a situation where the language used in court is not understood by the accused. Michael argues that the judicial experience in Nigeria treats failure to provide an interpreter in court proceedings as a matter of procedure and a conviction would not be disturbed on appeal except if it can be shown that the failure led to miscarriage of justice.[40]

Michael reveals the problem in court interpretation whereby most interpreters are neither competent nor qualified to discharge their duties. He therefore suggests that there must be an institute for training interpreters for Nigerian courts and establish

[39] Michael, C. O., *Communication of An Interpreter and Fair Trial under Nigerian Criminal Justice System*, International Journal of Legal Discourse, 2016, Vol. 1, No. 1, pp. 213-233.

[40] Ibid p. 228. One of the cases discussed by Michael is *Ajayi v Zaria Native Authority*. According to the author, in this case "the proceeding was in Hausa language and was interpreted by five different interpreters at successive stages of the proceedings to the appellants who were Yorubas and who and who were not proficient in English language. Two interpreted into English and one into Yoruba, it did not appear how they be qualified to be called on, to interpret or who they were, except that one was a school boy who spoke English but not Yoruba. When the appellants appealed against their conviction to the High Court, it was found that in at least two instances the ability of the interpreter to interpret satisfactorily might be questioned but however, held that the whole proceedings has been interpreted correctly."

professional bodies for licensing and regulating those who are proved to be competent and qualified in interpreting several Nigerian languages. His suggestions seem to reflect the fact that the act of legal communication through the service of an interpreter is highly skillful and therefore requires specialist training in an institution.

Michael exposes the present study to an insight of interpretation as a means of overcoming language barrier from the perspective of Nigeria. Borrowing from Michael's contribution, this study had a framework within which to examine interpretation as a means of resolving instances of language barrier in court proceedings. Possi's PhD thesis deals with legal and policy aspects of disabilities.[41] The thesis does not deal with language barrier in court proceedings that affects persons with disabilities and particular those with hearing impairments.

The focus of the work seems to be on persons with disabilities and their rights in work places. It nevertheless discusses laws and policies from some jurisdictions in Sub-Saharan Africa including Tanzania as regards the obligation of providing facilities to persons with disabilities. They include technical aids to improve their practical ability. Such technical aids include braillers, typewriters, callipers and hearing aids. Possi's work provided an insight to the present study in considering how the law in Tanzania deals with language barrier that affects litigants or accused with hearing or speech disabilities. This aspect is dealt with in passing in this study as it merits an independent study on its own right.

[41]Possi, A, 'Persons with Disability's Right to Work in Africa: A Comparative Study of Employment and Disability Laws, Policies and Relevant Institutional Mechanisms of Tanzania and Selected African States', PhD Thesis, Friedrich-Alexander-Universität Erlangen-Nürnberg, Germany, 2014, p. 185.

Another piece of literature considered in this study is the work entitled "Access to justice in sub-Saharan Africa: the Role of Traditional and Informal Justice Systems.'[42] Although this work mentions and acknowledges that the author is Penal Reform International, in actual sense, it was Joanna Stevens, who did write-ups and compilation of the materials of this book.[43]

The central discussion point of the literature is the dichotomy approaches on formal and non-formal justices. For instance, in the same literature, it was contended under the subheading 'Access to formal state justice system' that the language proceedings are normally not understood. Even though the interpreters are accessible, the question posed is whether in all cases, substantive justice is done. The work cited an example which was given by one observer of cases in Kalenjin-speaking area of south western Kenya in 1979 before the Magistrates' Court. The observer as quoted in the reviewed work stated thus:"When translations are required, the proceedings are usually long and turgid. Quite often, the translations are hopelessly inaccurate, and invariably they do not capture the nuances of the speaker's mother tongue."[44]

The above observations are in line with this study. The work addresses the main concern parties have in understanding the language used in court records and proceedings. The work does not go further to provide specific cases that show how language barrier manifests itself and how it may lead to miscarriage of justice. At the end and whilst quoting Keulder, this work maintains the position that:

[42] This work is electronically available and can be accessed through www.penalreform.org. This book was published by Penal Reform International as part of the New Models of Accessible Justice and Penal Reform Project, funded by the UK Department for International Development.
[43] Ibid.
[44] Ibid p.6.

> *Those who have criticised [informal traditional justice forums] as being too traditional to promote development are often too simplistic in their arguments. They are bound up in the traditional-modern dichotomy in which 'traditional' is equated with 'backward' and 'modern' with 'advanced'. Development can thus only occur within a 'modern' framework. The main problem with this equation is that it is based on a very static view of tradition. It ignores the fact that traditions are often 'invented' and hence, very 'modern' in context."*[45]

Relying on Sachs and Welch, the work argues that the problem facing those who wish to transform the colonial-type structures of justice and replace them with new structures that serve the interests of the people, is precisely how to create the conditions both institutionally and subjectively for the integration of the so called universal standards of justice [due process] into a popular community-based [state] system.[46]

The final conclusion of the author is seemingly drawn from Pavlich who said that "[i]t is important to take seriously the realisation that the 'law is only partially constituted by the state's formal apparatus. Any attempt at delineating a legal system of the future must take the existing plurality of legal forums as its point of departure."[47] A very interesting statement by the author drawn by relying heavily on Nina is that the foregoing "…entails understanding that there is no one solution to community conflicts resolution, but multiple solutions."[48] In other words, people should be allowed to shop for justice. In a strict philosophical sense, it is argued,

---

[45] Ibid p.6 quoting Keulder, C., Traditional leaders and rural Development, in D'Englebronner- K., et al (eds), Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authorities in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16/11/1995, New Namibia Books, Windhoek, pp. 289-323.

[46] Ibid p.168 quoting with approval, Sachs & Welch, H. Liberating the Law: Creating Popular Justice in Mozambique, Zed Books, London, 1990, p 22.

[47] Ibid p. 169 quoting Pavlich, 'People's Courts, Postmodern Difference, and Socialist Justice in South Africa.' *Social Justice*, Volume 19, No 3, 1992, pp. 29-45,p.40.

[48] Ibid p. 169 quoting Nina, D., 'Community Justice in a Volatile South Africa: Containing Community Conflict, Clermont, Natal.' *Social Justice*, Vol. 20, No 3-4, 1993, 129-143, p. 139.

shopping for justice has significant connotations. On the one hand, one must suffer pain in order to appreciate any good results needed. On the other hand, it can be construed that, nothing should go for nothing, something for something, meaning that, shopping for justice entails that some procedural requirements some of them being painful should be experienced and exercised by whoever seeks justice in the courts of law as famous legal jargon says "*quid pro quo*." Despite the good and exemplary materials provided by the authors of this article, they did not discuss anything on the language being the barrier for access to justice in any detail. Much of the directives of the author settle on the formal justice being best justice.

In another article titled 'How to Measure the Price and Quality of Access to Justice?', its authors expounded on access to justice.[49] According to the authors, the problem of language they mentioned could be overcome by hiring interpreters which corresponds with the stance of this study. They describe that citizens need 'paths to justice' which is pricey. According to the said authors costs incurred by the disputants include money, their efforts and time spent for court action, negotiations or procedures in dispute resolution. The above authors argue that the process of access to justice is usually extremely complicated. It involves various choices to be made by many people with different actions. They explain in details how the path to justice for a claimant takes place. They argue that, if the paths to access are too burdensome, the rights will not be enforced. The authors conclude that, it is a challenge to measure access to justice. Nevertheless, they did not look at language barrier in relation to access to justice and how language barrier can occasion

[49] Barendrecht, M and Giesen, I., 'How To Measure the Price and Quality of Access to Justice' http://papers.ssrn.com/so13/papers.sfm?abstract_id=949209 (Accessed 18/11/2017).

miscarriage of justice. Such gaps are addressed in this study.

Conversely, Mazrui in his article titled 'Language and the Rule of Law: Convergence and Divergence', argues that the law used in courts in Africa is culturally not derived from the African perspective.[50] In this respect, Mazrui states that some of the accused persons neither understand their rights nor what is happening in court. He argues, the right language in most of the African countries is seldomly used. The contribution of this work is indeed valuable and is paving the way for the present study. It is particularly so because Mazrui's work underlines language fair trial rights as priority rights which this study also underpin.

Additionally, Namakula's work titled 'Language and the Right to Fair Trial Hearing in International Criminal Trials' addresses language barrier in multilingual court room in international Criminal Tribunal. Namakula argues that language fair trial rights are priority rights situated in the minimum guarantees of trial fairness. According to Namakula, the court has an obligation to fully respect such rights in the process of ensuring justice. The obligation is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights. Essentially, Namakula insists that the court must ensure that parties concerned understand and are understood by providing all the necessary translation and interpretation facilities in court.[51]

However, Namakula's work concentrated only on the international criminal justice and not on civil and criminal justice at municipal level which this study

[50] Mazrui (n 4).
[51] Namakula (n 4) 4.

addresses.[52]Namakula's work is however exceptionally relevant in the present study. The stance taken by Namakula's work as to language fair trial rights is invoked in the present study in the pursuit of making wider sense of article 13(6)(a) of the Constitution of United Republic of Tanzania as it relates to right to fair hearing and language use in court proceedings.

Moreover, Karton in one of his classic work titled "Loss in Translation: International Criminal Tribunal and Legal Implications of Interpreted Testimonies"[53]offers an important contribution to the present study. The author asserts that during the process of translation and interpretation, errors are not just possible but they are inherent to the process. Such errors are not merely a technical problem. They can infringe on the rights of litigants and cause loss of evidence and distortion of witness testimonies, which leads to verdicts based on faulty findings of fact. One may argue that the foregoing standpoint does not necessarily mean that every translation must constitute errors as stated by Karton.

Indeed, there are circumstances that lead to errors in translation. In other words, as to whether or not a translation would consist of errors depends on the circumstances of each and every case. Arguably, circumstances that may contribute to such errors include lack of court facilities such as transcribers or having incompetent interpreters which this study underpins, a complete failure to provide interpreter in a relevant case, and the use of language which judicial officers and other court room participants are not very much conversant with.

[52]Ibid.
[53] Karton(n 4).

Furthermore, an article from Kenya presents the views of the court interpreters about language use in courts in Kenya.[54] It clearly states that Kenya is a multilingual country with over 42 languages. In such a heterogeneous society, language issues in official communication become intricate as those who do not understand the languages designated as official are discriminated.[55] In the legal domain, the article explains the policy that English and Kiswahili are the official languages of courtroom communication while interpreters are provided for those who do not understand English.[56] And so, the courts are multilingual in nature and it is against the background of the use of various languages that this article examines the views of the court interpreters on the various languages used in courtroom communication.[57] Nonetheless, this article did not discuss in great length the legal regime as to language use in Kenya, the best practice as to interpretation and interpreters, and cases in which language barrier was at issue or evident. Such aspects are dealt with in the present study.

Another fascinating article is from Nigeria, which essentially examines the language of law in selected court cases in Nigeria. This article examines the language of law, technically known as legalese. The article posits that legal matters are normally written in a specific language using registers that are peculiar to law, explicating the semantic implication of legalese that are used to convey such cases to the understanding of a layperson. Since law aims at precision, legalese is used to avoid

[54] Odhiambo, K., et al., *Court Interpreters View of Language Use in Subordinate Courts in Nyanza Province, Kenya,* Theory and Practice in Language Studies, 2013, Vol. 3, No. 6, pp. 910-918.
[55] Ibid.
[56] Ibid.
[57] Ibid. This article employed a survey design of study population comprised of court interpreters from selected subordinate courts in Nyanza province, Kenya in which the residents are bilinguals but with very strong affinity to their mother tongue (Dholuo). Purposive sampling was used to select the court interpreters. Data for the study was generated through questionnaires administered to the court interpreters.

generalisation. The ordinary person who is outside the law profession is not familiar with legalese. In as much as legalese has been discussed in this article and how it affects laypersons in accessing justice in courts, it has not discussed in detail comprehensive mechanisms and facilities as a panacea to overcome language barrier as it is addressed in the present study.[58]

Therefore, although this study does in some respects concur with what has been argued in the above studies, it primarily seeks to cover the gap left by previous literature by writing on language barrier in accessing justice in Mainland Tanzanian courts and the extent to which it is affected by the problem of language barrier in Tanzania. This study fills the gap specifically by examining the practicality of the language use in courts and the manner in which it creates language barrier in court proceedings rather than confining itself to the Kiswahili versus English debate. This study also explores the law and cases relating to language barrier and implications arising from such barrier.

1.8 Research Methodology

The word 'research' is an art of scientific investigation. It is a scientific and systematic search for pertinent information on a specific topic.[59] Research is often thought of as a process that is a set of activities unfolding over time. It is useful to look at it as a process with distinct stages, as different stages entail different tasks.[60]

---

[58] Ashipu, K.B.C and Umukoro, G.M., *A Critique of the Language of Law in Selected Court Cases in Nigeria*, Mediterranean Journal of Social Sciences, 2014, Vol 5 No 8, pp. 622-626.

[59] See Salter, M., and Mason, J., Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research, Pearson Education, England, 2007, p.6; Kothari, C., Research Methodology: Methods and Techniques (2nd Revised Edition), Wishwa Prakashan, New Delhi, 1990, p.1.

[60] Ghauri, P., and Gronhaug, K. Research Methods in Business Studies, Fourth Edition, Pearson Education, London, 2010, p 29.

Legal research is simply a 'systematic finding' or ascertaining' 'law' on the identified topic or in the given area as well as 'an inquiry' into 'law' with a view to making advancement in the science of law.[61] On the other hand, 'research methodology', refers to a set of rules of procedures about the way of conducting research. It includes in it not just a compilation of various research methods but also the rules for their application and validity.

Hence, it is not only a study of methods but also of explanation and justification for using certain research methods and for the methods themselves. It includes in it the philosophy and practice of the whole research process, a systematic way of solving the research problem. It is a 'science of studying how research is done scientifically'. It engages a study of various steps and methods that generally a researcher needs to adopt in his investigation of a research problem along with the logic behind them.[62]

Legal research also refers to the process of identifying and retrieving information necessary to support legal decision-making. It includes in it each step of a course of action that begins with an analysis of the facts of a problem and concludes with the application and communication of the results of the investigation.[63] Since the basic function of legal research is to find the law, therefore, legal research is 'a systematic finding' or 'ascertaining of ' law' on the identified topic or in the given area as well as 'an inquiry' into 'law' with a view to making advancement in the science of law.[64]

---

[61] Vibhute, K., & Aynale, F., *Legal Research Methods: Teaching Material*, 2009, p22. <www.chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> (Accessed 31/07/2017).
[62] Ibid p. 19.
[63] Ibid p.30.
[64] Ibid p.22.

Generally, research involves gathering information for a purpose, and it is the purpose that usually determines the type of research undertaken and how it is conducted. In similar vein, legal research involves the collection of legal materials for the purpose of discovering new facts that would contribute to the body of knowledge in a legal field or subject. In other words, the aims of conducting a legal research include; identifying 'gaps' and 'ambiguities' in law, undertaking 'social auditing of law', ascertaining laws on a given subject or topic and recommending developments in law as suggested in this study.[65]

The primary sources in legal research are the constitution, statutory orders, rules, regulations, court proceedings, national gazette which publishes Acts/Proclamations passed by Parliament as well as case reports and unreported cases, that publish judicial pronouncements of different higher courts. All these are categorised as primary sources in legal research because they contain original information and observations relating law. This information can be collected directly from the courts, persons having such information and documents.[66] On the other hand, information obtained from primary sources by organising such information in a planned and systematic manner is the secondary source. The latter refers to commentaries on statutes, commentaries on cases, textbooks, journal articles, treaties, abstracts, encyclopaedias, dictionaries, thesauri and bibliographies.[67]

There are several techniques or methodologies which one may utilise to carry out legal research. For this reason, in order for the legal researcher to employ the most

[65] Ibid p.33.
[66] Ibid p.47.
[67] Ibid pp 47-48.

appropriate research methodology, he/she needs to identify and understand the distinct features of the particular legal research one is undertaking.[68] For the purpose of this study, the research methodology employed by researcher was doctrinal legal research complemented by empirical method, namely, observation method.

1.8.1 Doctrinal Legal Research

Doctrinal legal research which is also called 'black-letter law' is an approach that relies extensively on using primary and secondary sources of law to explain law or conduct an inquiry into the law with a view to making advancement in the science of law. In other words, doctrinal legal research is concerned with analysis of primary and secondary sources of law in a given area as well as 'an inquiry' into 'law' with a view to making advancement in the science of law. It seeks to systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources.[69]

Doctrinal legal research is simply defined as research into legal doctrines through analysis of statutory provisions and cases by the application of power logic and reasoning, which includes deductive and inductive reasoning, analogy on one hand and statutory interpretation on the other. Its main emphasis is on analysis of legal rules, and legal doctrines or legal principles.[70] Doctrinal research is the traditional and most common research methodology undertaken by legal researchers. It is purely a qualitative research which is non-numerical hence categorised as

[68] Ibid p.46.
[69] McConville, M and Hong, W., (eds), Research Methods for Law, Edinburgh University Press, Edinburgh, 2010, p 3.
[70] Ibid 4.

theoretical. Its approach involves the development of scholastic arguments for subsequent criticism and reworking by other scholars, rather than any attempt to deliver results which purport to be definitive and final. Any methodology' in this type of research are therefore employed subconsciously by scholars (and by practising lawyers) who would most usually consider themselves to be involved in an exercise in logic and common sense rather than in the formal application of a methodology as understood by researchers in the scientific disciplines.[71]

The researcher employed doctrinal legal research because it involves the employment and analysis of statutes (international and national), court proceedings, court cases both reported and unreported as primary sources of law and, reports, publications, journal articles as secondary sources of law. The sources used in this study relate to the subject matter under scrutiny and inquisition as among the main target of the study.

This methodology remains the defining characteristic of the present study which is essentially legal in nature. It played a very significant role by enabling the researcher to do the following. In the first place, it facilitated the examination of the existing laws relating to the language use of the courts. Secondly, it facilitated exploration of various cases relating to language use in the courts and their corresponding legal underpinnings in accessing justice and the inherent problem of language barrier in Mainland Tanzania. Thirdly, since doctrinal legal research methodology has the potential to contribute to the development, continuity, consistency and certainty of

[71] Chynoweth, P. 'Legal Research' in Knight, A and Ruddock, L (eds), Advanced Research Methods in the Built Environment, Willey-Blackwell, London, 2008, p. 28, 31 and 32.

law, it has therefore enabled the researcher in the present study in the end to give sound recommendations which if adopted would contribute to enhancing access to justice in court. This methodology befitted the study which is essentially legal and has never before been employed in similar studies elsewhere where such studies were characteristically undertaken from the perspective of non-legal discipline, particularly, linguistic as pointed out in the literature review.

As pointed out above, the doctrinal legal research was complemented by empirical method in which observation, as a qualitative method of data collection was used to gather information from the courts during court proceedings. The aim was to solicit information which could not be obtained by doctrinal methods. In so doing, two types of observation method were used in a bid to develop a holistic understanding of the court environment and the process and nature of court proceedings.[72] The types of observation used were direct observation and participant observation.

Direct observation involves observation without participation. It is a method of collecting evaluative information in which the evaluator watches the subject in his or her usual environment without altering that environment.[73] It is used when other data collection methods are not effective; and when the goal is to evaluate an ongoing behaviour process, event, or situation. Participant observation is the process enabling researchers to learn about the activities of the people under study in the natural setting through observing and participating in those activities.

[72] Kawulich, B. B., Participant Observation as a Data Collection Method, Forum: Qualitative Social Research, Open Journal Systems, 2005, Volume 6, No. 2, www.qualitative-research.net (Accessed 18/11/2017), Henn, M, Weinstein, M, Foard, N, A Short Introduction to Social Research, Sage Publications, London, 2006. pp 171-174.

[73] Ibid.

Direct observation was employed to obtain detailed and lengthy notes by observing only in court proceedings without participating in any activity. This was done during the collection of cases and proceedings for doctrinal analysis from various courts. A close observation was however made in Bagamoyo District and Primary Courts with a view of getting in-depth understanding of the practices of the lower courts as regard to instances of language barrier.[74] The observation mainly focused on court room setup, court room environment, court room communication, the processes involved in court proceedings, the taking and recording of proceedings and availability of court facilities.

Participant observation was employed when the researcher was invited by the District Court of Bagamoyo to interpret in one of the criminal cases in which the court had no interpreter to interpret.[75] The researcher was privileged to receive such an opportunity and took it as a means for conducting better observation. Hence, generation of a complete understanding of language barrier which is exacerbated by having ineffective and inefficient mechanism for courtroom interpretation. Through such participation, the researcher had better interpretation of what normally happens in court and why. The observation method enabled gathering of relevant information which otherwise would not have been obtained by relying solely on doctrinal methods. Despite the use of observation, doctrinal analysis remains the defining characteristics of this study.

---

[74] The decisions of the lower courts particularly are ordinarily not reported anywhere and they are not easily accessible unless one goes to the specific courts.

[75] The researcher interpreted in the case of *Republic v Tatu Rajabu Msango and Two Others* Criminal Case No. 297 of 2012 in the District Court of Bagamoyo. See APPENDIX No.2 of the proceedings interpreted by the researcher of this study. This is also discussed in chapter five of this study.

1.8.2 Research Design

Research design is the plan and design of the particular research study. In other words, the research design provides a plan or a framework for collection of relevant materials and their analysis.[76] In this study, the researcher employed doctrinal research design which was also complemented by empirical method, namely, observation. This study collected judgments, rulings, and court proceedings from Mainland Tanzania courts. Primary Courts decisions and court proceedings were mainly collected from Bagamoyo District.

A doctrinal analysis was employed to examine and analyse the collected sources. The doctrinal analysis entailed the use of various legal methods, especially rules of statutory interpretations, and various forms of legal reasoning such as analogy, deductive reasoning and inductive reasoning. These methods were applied in appropriate circumstances in this study. It is through the doctrinal methods and empirical method (observation) and from the mentioned sources that materials and information were generated, qualitatively analysed and systematically presented and explained in relation to the context of this study. Findings were indicated and discussed in respective chapters as is expected in any study mainly employing doctrinal legal scholarship.

1.9 Organisation of the Study

This study has six chapters. The first chapter provides the contextual framework of the study and background information on both language use and process of justice

[76] Ghauri and Gronhaug (n 60).

determination in Tanzania. The second chapter examines the theoretical framework on access to justice and problem of language barrier. Chapter three explores on the international aspects of language use in accessing justice. Chapter four addresses the legal framework for language use and language fair trial rights in Mainland Tanzania. Chapter five looks at the insights and implication of language barrier in Mainland Tanzania courts and in so doing the chapter goes further to explore the responses by the courts on language barrier. Chapter six is the last chapter. It provides the conclusion, major insights of the study and key findings and recommendations.

1.10 Conclusion

This chapter introduces the research problem which forms the context within which the study was conducted. It explains the research objectives, gaps in the literature and research questions that guided this study. The research methodology applied in this study and the chapterisation have been provided as guidance for the reader to know where each material can be found.

CHAPTER TWO

2.0 CONCEPTS AND THEORIES OF ACCESS TO JUSTICE IN RELATION TO LANGUAGE BARRIER IN COURTS

2.1 Introduction

Access to justice, language and language barrier are interrelated concepts in the scholarship on right to fair hearing or trial. The interrelationship is rooted in the significance of language in the pursuit of seeking and accessing justice. As one strives to protect on's rights and pursue a claim or criminal complaint in courts, quasi-judicial bodies, and/or law enforcers, he employs language to communicate the claim or complaint.[77] The same is for one who seeks to defend himself from the claim or charge laid against him. Language is therefore a means through which one can communicate in the pursuit for justice, be it from the courts of law, quasi-judicial bodies or law enforcers.[78]

Complexities in languages used in the endeavour to access justice affects communication and leads to language barrier in the process.[79] The barrier would necessarily affect one's ability to effectively seek remedies in the courts of law and other legal institutions. It may also affect ability of the court to take, record and understand the evidence and testimonies in the course of court proceedings. While access to justice is constrained by many other barriers which can be related to reasons such as costs and long distances to courts of law, discrimination, inequality, lack of legal awareness, and corruption in the justice system; language barrier

[77] Namakula, C.S (n 4) 36.
[78] ibid.
[79] Ibid p.3. The complexities include misunderstandings, translation and interpretation errors and cultural distance among participants in trials, the presentation and the perception of the evidence.

remains the most significant as it also affects the courts and has rarely been widely addressed by legal scholars. Unlike other barriers, language barrier is exacerbated by globalisation and the ease with which people can now move from place to place across the globe. It is therefore increasingly becoming prevalent in both developing and developed countries.

In this chapter, different concepts and theories as they apply in the field of access to justice in the context of language use and language barrier in courts of law are examined and discussed. The chapter will discuss and contextualise the concept of access to justice, barriers in the access to justice, language use and means available for overcoming language barrier. While doing so, the chapter will point out the meaning of the concept of justice that this study subscribe to and how in theory the barriers and in particular language barrier affect accessing justice in courts of law. Theories relating to language barrier in relation to access to justice which have thus far been propounded would also be examined with particular reference to circumstances obtaining in Tanzania.

2.2 Contextualising Access to Justice

Access to justice is a broad concept referring to the methods by which individuals are able to obtain information and legal services and to resolve disputes. It presupposes: (i) the ability of aggrieved persons to challenge violate actions in courts of law or authorized bodies; (ii) the accessibility to courts; (iii) the ability of courts to give effective remedies; (iv) equal and fair treatment before the law.[80] In general,

[80] Peter, C.M (n 7) pp. 304 and 306; Mirindo, F., Administration of Justice in Mainland Tanzania, Law Africa, Nairobi, 2014, p. 58. Access to justice includes access to court procedure, to legal aid and to extra-legal mechanisms so as to resolve conflicts. The World Bank and UNDP support the

access to justice is a fundamental concept, which entails the accessibility to court for all persons without any restrictions and unnecessary justifications.[81] According to Black's Law Dictionary, the term 'Access to Justice' has been defined as "the ability within a society to use courts and other legal institutions effectively to protect one's rights and pursue claims".[82] It means fairness and moral rightness.

The contemporary discourse on access to justice recognizes three critical ingredients. Firstly, that the legal system must promote justice. Secondly, that access to justice a justice-driven legal system must be assured to even the poor and that legal aid will ensure that even those who cannot afford counsel will be given lawyers by the state. Thirdly, justice is holistic which includes economic, political and social justice.[83] It is however important to note that in the past, the concept of "access to justice" used to refer to access to "government's judicial institutions" and in the late 1970s, it acquired a newer but broader meaning.[84]

A broader meaning has it that access to justice is the ability of an individual to get access to various institutions both judicial and non-judicial to pursue justice. Consistent with this view, Cappelleti and Garth define access to justice as having two prongs. Firstly, that the system has been equally accessible to all. And secondly, that it must result into individual and social justice. This means that the citizen must

---

programmes to improve access to justice in developing countries. These programmes aim to improve legislation, to develop legal aid institutions for the poor, to increase legal awareness and also to train the judges. <.http://www.ivogiesen.com/media/1038/access_to_justice_ 2006_ssrn.pdf> (Accessed 16/06/2016).

[81] Ibid. See also Carmona, M. S., and Donald, K., 'Access to justice for Persons Living in Poverty: A Human Rights Approach', http://ssrn.co/abstract=2437808 (Accessed 09/08/2017).

[82] See Garner, B.A (Ed.) Black's Law Dictionary (9th edition), Thompson-West, New York, 2009, p 924 and Oxford Advanced Learner's Dictionary, (8th edition, Oxford University Press, 2010).

[83] Guruswamy, M., and Aspatwar, B., 'Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court' https://papers.ssrn.com at p.9 (Accessed 09/08/2017)

[84] Galanter, M. *Access to Justice in a World of Expanding Social Capability*, Fordham Urban Law Journal, 2004, Vol. 37, pp. 115.

be able to approach and get his or her matter or dispute admitted into the court system. Eventually, after being heard, it should lead to the conclusion, which is individually and socially just. The viewpoint in the second prong suggests that the notion of just outcome of the dispute considers both individual and society, which is more challenging.[85] Some of those who subscribe to broader view of concept to justice have also looked at it from the perspective of justice seeker in the process to achieve redress rightly.[86]

Other scholars tend to look at the concept of justice whilst focusing mainly on arranging hierarchy principles of justice. The latter group of scholar includes John Rawls whose first principle insists on basic liberties such as liberty of conscience and thought, freedom of speech and assembly, freedom of the person (right to hold personal property), freedom from arbitrary arrest, seizure and political liberty. The second principle which he has provided is distributive justice.[87] According to distributive justice, the following criteria should be maintained as follows. The first criteria is that the economic and social inequalities are to be arranged such that both would be of greatest benefit to the least advantaged and they should be consistent to the principle of just savings. The second criteria is that the conditions of fair equality and opportunity attached to offices and positions should be open to all.

Access to justice has also been looked at as a process and not just as a situation or a goal. In relation to such view, it is also stated that access to justice exists only if poor

[85] Guruswamy and Aspatwar (n 83).
[86] Heys, C and Stefiszyn, K (eds.), Human Rights, Peace and Justice in Africa: A Reader, Pretoria University Law Press, Pretoria, 2006, p.24.
[87] Distributive justice concerns the nature of a socially just allocation of goods in a society. The society would be considered guided by the principles of distributive justice of which incidental inequalities in outcome do not arise.

and vulnerable people, suffering from injustices, have the ability to make their grievances be listened to, and are able to obtain proper treatment of their grievances, by state or non-state institutions, leading to redress of those injustice, on the basis of rules or principles of state law, religious law or customary law and in accordance with the rule of law.[88] Moreover, there are scholars who make proposition that access to justice is an issue of fundamental importance and has two dimensions. These dimensions include procedural (having a fair hearing) access and substantive justice (to receive a fair and just remedy). Therefore, it is of vital importance to ensure that members of the public have access to justice both in terms of process and substantive outcome.[89]

Although the concept of access to justice have been conceptualised differently by different scholars, the difference nevertheless underlines the same element of 'fairness' and hearing which means that they all share the same meaning. While in its narrow meaning, access to justice represents only the formal ability to appear in court, it is in its broad sense the concept engages the wider social context of the court system and the systemic barrier. The systemic barrier includes language barrier which the present study tries to address.[90] There is no doubt that the broader view of the concept recognises that access to the courts can be frustratingly elusive for individuals who cannot understand the language of the court and cannot afford to

[88] Jennings, W.I., The Law and the Constitution, (5th Ed), University of London Press, London, 1959, pp 147-151.

[89] Justice Ramaswamy saw rule of law as a "catalyst, Rubicon to the poor to reach the ladder of social justice". See Guruswamy and Aspatwar (n 83) 26.

[90] The right of access to justice is inherent under the principle of equality in Article 13(1) of the Constitution of the United Republic of Tanzania, which provides that: all persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law. In addition, Article 13(6) (a) goes on to state clearly the right to fair trial as a key element in accessing justice in courts.

hire an advocate to represent them in court. Without access to justice, the individuals, particularly the poor people and disenfranchised, are unable to realize their rights, face challenges or discrimination, or hold decision- makers accountable and for this reason access to justice is seen as problematic.[91]

In Tanzania the concept was a subject of judicial scrutiny in the case of *Julius Ishengoma Francis Ndyanabo v Attorney-General*,[92] where, among other things, the Court of Appeal of Tanzania declined to hold that the concept of access to justice constitutes mere filing of pleadings and paying the required court-fees. The court seemed to subscribe to the broader view of the concept although it was essentially referring to the concept with reference to right of access to courts. In so doing, the Court of Appeal of Tanzania maintained that:

> *With great respect to the learned Judges, we cannot agree that access to justice constitutes mere filing of pleadings and paying the required court-fees. The right to have recourse or access to courts means more than that. It includes the right to present one's case or defence before the courts. It cannot, therefore, be correct to say that once he files his petition a petitioner in an election petition has enjoyed the whole of his right of access to justice. Access to justice is not merely knocking on the door of a court. It is more than that.*[93]

Looking at the concept from broad perspective of access to courts in relation to rule of law, fundamental rights, and independence of judiciary, the Court of Appeal of Tanzania had this to say:

> *We agree with Prof. Shivji (we did not hear Mr. Mwidunda expressing a view contrary to that submission) that the Constitution rests on three fundamental*

---

[91] Vapnek, J., Boaz, P., and Turku, H., *Improving Access to Justice in Developing and Post Conflict Countries: Practical Examples from the Field*, Duke For Law and Social Change, 2016, Vol. 8, pp. 27-44.
[92] *Ndyanabo v Attorney-General* [2001] 2 EA 485 (CAT) at p.498.
[93] Ibid.

> *pillars namely, (1) rule of law; (2) fundamental rights; and (3) independent, impartial and accessible judicature. These three pillars of the constitutional order are linked together by the fundamental right of access to justice. As submitted by Prof. Shivji, it is access to justice which gives life to the three pillars. Without that right, the pillars would become meaningless, and injustice and oppression would become the order of the day.*
>
> *Access to courts is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard.*[94]

It is instructive that *Ndyanabo's case* underpins the significance of language and hence language rights for one cannot have an effective recourse or access to courts which includes the right to present his case or defence before the court, if he does not understand the language of the court and he is not facilitated with court interpretation. The underlying philosophy is that one cannot be heard in relation to his defence or a remedy he is seeking if he cannot communicate in the language of the court. This necessarily reinforces the duty of enabling a litigant or an accused person to understand the language of the court through any means of overcoming language barrier available at the disposal of the court. It is in such respect that a litigant or an accused person seeking a legal remedy or defending a case can respectively be able to prepare his defence or knock on the doors of justice and be heard. Needless to say, *Ndyandabo's* case also envisions other barriers to accessing justice in courts which need to be addressed to enhance access to justice.

It is not without significance to note that other courts elsewhere have enhanced access by doing away with traditional understanding of *locus standi* and bringing

[94] Ibid. Any nation that is governed by arbitrary decisions of individual government officials is in contrast with the principle of rule of law. The inference of rule of law is that, every citizen is subject to the law including the legislatures themselves whose role is to enact the law.

public interest litigation.[95] The notion of public interest litigation is meant to address the people who are unable to approach the courts by reasons such as poverty, disability or any socio-economic disadvantage. In *S.P Gupta v Union of India,*[96] the Supreme Court of India explained the role of the judiciary by saying that it has:

> *.....to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. It cannot remain content to act merely as an umpire, but it must be functionally involved in the goal of socio-economic justice.*[97]

Notably, all societies have some challenges in accessing justice. However, in the developing countries, the barriers of access to justice are most pronounced and have far reaching implications. This study therefore takes the broader view of the concept although it focuses on the barriers of accessing courts with particular reference to the problem of language barrier. Needless to say in addition to language barrier, other barriers that affect individuals' right of access to justice relate to costs, long distances, and lack of legal awareness, literacy, corruption, and culture.

2.3 Barriers Affecting Access to Justice

Justice is conflated with access to law, but even within the realm of law, the focus is narrowed to the formal processes of institutionalised dispute resolution, and more particularly, the courts.[98] The attention here is directed to the "barriers" that impede

---

[95] In India, the Supreme Court shortly after independence, gradually expanded its role making it become the most powerful court in the world. The crafting by the court jurisprudence facilitated by easy access to it has contributed greatly to its status as a powerful court. To ensure the accessibility of the court system, a citizen could bring a case on behalf of others that is, a class of injured people, irrespective of whether he or she was part of that class, since it was perceived that among that class, might well be far too disadvantaged to be able to access the court system.

[96] Supp.(1) SCC 87 (India) (1981).

[97] Ibid at para.27.

[98] Mosher, J.E., *Lessons to Justice: Racialized Youths and Ontario's Safe Schools,* OSGOODE Hall Law Journal, 2008, Vol. 46, p. 807.

access to courts. As such, these impediments have been the focus of massive reform efforts in many jurisdictions that seek to make the courts more efficient through simplified procedures, the licensure and regulation of paralegals, judicial case management, legal aid plan, costs regimes and plain language initiatives and provision of interpreters and interpretation and translation facilities.[99] It is within this context that the barriers and in particular language barrier is addressed in this study. Although the challenges in accessing justice are experienced in most of the countries globally, however, the barriers of access to justice are most tangible in the developing countries and hence have great impact on the poorest people.[100] This is mainly because of among other things budgetary constraints that limit the countries' ability to address the barriers.

Of significance to note is that language barrier is, by and large, the only barrier which has proved to significantly affect both developed and developing countries notwithstanding their respective level of economic development. It is also one of such barriers which is likely to affect an individual despite his economic wellbeing. The question is on how language barrier presents itself and affects access to justice. One could also consider a situation where a poor litigant does get to court or gets to court but fails to follow his case or a case levelled against him because of language barrier. The same for an accused person who has no means to afford the services of

[99] Ibid 816.

[100] Carmona and Donald (n 81). This paper shows that Finland and other countries also have some challenges in access to justice. The paper discusses that the barriers can be related to reasons and costs and long distances more importantly to discrimination, inequality, lack of awareness, and corruption in the justice system. However, the authors reveal the evidence that women are more likely to be affected by demands for bribes within the justice system. Likewise, the authors point out that people living in extreme poverty have less opportunities to access their rights and are disproportionately affected by barriers of access to justice. The barriers are reflective on the manner in which they seriously impede or discourage them from seeking justice.

an advocate and does not understand the language of the law and the court or cannot follow proceedings due to speech or hearing disabilities. In such scenarios, the obvious question could be on the litigant's or accused person's chance of securing justice and getting a fair trial. The other question could be on language barrier as a thorny issue in accessing justice both to poor persons, persons with special needs in speech and hearing and wealthier people.

Indeed, the above are obvious issues that arise when one considers barriers and trying to figure out their manifestations and impact in access to justice. Barriers are more often than not reflective of the manner in which they seriously impede or discourage affected litigants or accused persons from seeking justice and seeing justice being done. Barriers are also reflective as to the way they tend to limit the affected litigants or accused persons' options to enforce their rights and delays in disposition of cases in the courts of law.[101] It has therefore been said that the "mere existence of these barriers constitutes a major threat to the principles of equality and non-discrimination, one of the fundamental pillars of international human rights law."[102]

2.3.1 Limited Legal Awareness

Legal awareness is also referred to as legal consciousness, which helps to promote consciousness of legal culture. Understanding and awareness of one's rights, and the ways in which such rights can be invoked and enforced by judicial adjudicatory

[101] Ibid. See also Mosher (n 98), attributing delays as one of the manifestations of barriers. See also Odhiambo, K., at el (n 54) 910-918 which observed that research conducted on bilingual discourse suggests that language barriers are often identified as the most frequent impediment to legal discourse.

[102] Ibid.

mechanisms are fundamental to the aggrieved persons for remedying violations.[103] Due to ignorance of legal knowledge, one is unaware of the existence and content of the legal rights and entitlements and more so how to present it in a formal claim in the courts of law using the language of the court records. There is no doubt that the consequences resulting from this barrier tend to become even worse when one has limited knowledge and understanding of language of the law and the court.[104] This barrier and its relationship with language barrier are summed up succinctly by Wanitzek and Twaib in the following words:

> *.....The larger part of the criminal law, especially its specific elements and procedure, remain unknown. In civil law, the law is even less known. In reality, therefore, the general populace remains mostly ignorant of the law. Consequently, the claim that everybody is presumed to know the law amounts to nothing but a fallacy.*
>
> *This position is aggravated in many African countries by the existence of a plurality both of legal systems and of languages within one and the same country. One cannot therefore speak of knowledge of 'the' law because a certain law, mostly the African customary law, may be well known to a person or a group of the population, while the official state law remains hugely unknown. The diversity of languages plays a major role in this situation. The process of Reception of European legal systems in Africa during the colonial period and thereafter embraced not only the taking over of a foreign law and legal culture but, inseparably, also of a foreign legal language or…… of "a whole new language, a new culture and a new way of life"*[105] *(footnotes omitted).*

As to how this barrier of limited legal awareness may affect people, two examples are worthwhile referring to. The first example is from Thailand, where research conducted found that women survivors of sexual violence are usually ignorant that they are entitled to be interviewed by female police investigators and are not aware of the procedural rules stating that they do not have to confront the accused

[103] Carmona and Donald (n 81) 15.
[104] Wanitzek and Twaib (n 4) 115-137.
[105] Ibid pp. 115 and 116.

perpetrators in court.[106] As a result of lacking of such knowledge, it is possible that such women have been reluctant to lodge complaints in courts thus causing impunity to perpetuate. In another example from Tanzania, one woman appealed against the decision of the Primary Court, where the Primary Court did not guide her as to how she was supposed to present her witnesses.[107] It was explained under her memorandum of appeal that she had brought her witnesses to court, however, due to procedural rules; she did not have the chance to present them to the court. Unfortunately, she was barred from presenting witness testimony and therefore lost the case since she did not present the witnesses before she told her case to the judge.[108] Therefore, legal awareness can empower people to demand justice and get effective remedies at all levels. Without this, people get hindrances in accessing justice in courts.

2.3.2 Financial Barriers

Financial hurdles may block people's access to justice in many ways. Among them are accessibility to a legal representative and court interpreters or translators. Legal assistance and representation traditionally are at the core of access to justice. Without it, there are high risks that there will not be equality of arms between parties. Therefore, trials will not be fair and legal right will not be adequately enforced or protected.[109] This is because, legal processes are usually extremely complex and their requirements onerous, thus creating insurmountable obstacles for those without assistance of a lawyer, particularly, if the other party enjoys such

[106] Ibid p.115.
[107] Allen, R. J., et al, *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*', Boston University International Law Journal, 2015, Vol. 31, pp. 217-266, p. 241.
[108] Ibid.
[109] Ibid 18.

assistance. Consistent with the foregoing is that financial hurdles may also constrain one from employing an interpreter or translator to assist him in translating materials written in a language which he has limited knowledge. This is more so when such materials constitute the cause of action of the suit the individual has brought in court against another or the evidence that builds up his case. Because of financial constraints, employment or engagement of court interpreter readily available in courts is unattainable as is the provision of adequate facilities relating to interpretation and recording of court proceedings.

For example, there are numerous technicalities involved in bail procedures, trials and appeals all of which require legal knowledge and specialised law skills by the help of an advocate or a lawyer. Legal assistance and representation is vital to both criminal and civil cases. If a person is unrepresented, he is averted from asserting and defending his rights. As such, the victims or the accused living in poverty are challenged by not affording to have access to legal representation. Such resource constraints, for example, disproportionately affect the poor who cannot afford to pay the necessary court fees or hire an advocate.[110]

Nevertheless, the quality of legal aid services is significantly undermined by inadequate allocation of human and financial resources in many developing countries. In most instances, the fees legal aid lawyers are paid are far from proportionate with the amount of time and effort required to effectively litigate a criminal case. In civil cases and cases other than criminal ones, the government in

[110] Jagannath, M., *Barriers to Women Access to Justice in Haiti*, Cuny Law Review, 2011, Vol. 15, pp. 27-52. According to this article, litigants in Haiti are less likely to succeed in prosecuting their claims as a result of disorganization, inefficiency and inadequate resources.

Tanzania does not avail an interpreter/translator to a relevant litigant. In Sudan, the cases which can last for years such as those of capital punishment, the lawyers receive a total of USD $ 100.00 to represent a client, while in Lesotho, lawyers are paid for only one appearance per matter and often not at all.[111] In this respect, lack of adequate funding significantly impinges on the quality of free legal services, as legal aid lawyers may not be professionally experienced. For instance, in 2011, out of the eighteen (18) legal aid lawyers accessible in Malawi, sixteen (16) of them had experience of less than five years.[112]

In addition, in filing civil claims and motions or when exceeding the time limits, fees need to be paid. Nonetheless, in civil matters, the legal costs of the successful party are often ordered to be paid by the unsuccessful party. For a person living in poverty, such fees are unaffordable and act as hindrance to instituting claims. In some countries, the cost of divorce proceedings including claims of child custody or filing a land inheritance claim is worth or equal to the monthly income of a person living in poverty.

Moreover, there are numerous costs associated with accessing justice, which constitute a key barrier for those who simply cannot afford these costs. Fees are encountered at every stage of the legal process, together with several indirect costs, such as for obtaining a legal document, commissioning independent expertise, photocopies and phone calls. These expenditures are a critical factor in preventing the poor from accessing justice in courts. [113] It is not an uncommon lament in

[111] Carmona and Donald (n 81) 19.
[112] See UN, United Nations Office on Drugs and Crime, Geneva, 2011, pp.9-11.
[113] Carmona and Donald (n 81). The complexity of the design and implementation of some legal aid programmes

Tanzania as widely recognised that many citizens cannot afford legal representation; as the former President Benjamin William Mkapa observed in 2007, "we nurture a system with entry threshold so high that only the mighty of the land can enter".[114]

Notably, the implementation by most governments in the world in reaction to the global economic downturn is causing a devastating impact on the society. In some European countries, for instance, the provision of legal aid has been cut while the court fees have been increased during the time in which the demand for civil legal aid is increasing for several critical matters such as welfare review or asylum proceedings.[115] In Ireland, for instance, from 2007 to 2011, the number of applications for civil legal aid rose by 84 per cent whilst the allocation of resources to legal aid decreased.[116]

2.3.3 Geographical and Physical Barriers

Majority of people in the world live outside urban centres, often in remote, hard-to reach areas at great physical distance from police, prosecutors, courts, information and registration centres. This barrier coupled with transport service limitations and costs constitutes a serious obstacle to such people in so far as access to justice is concerned. The travel costs particularly for the poor people are unaffordable.

---

also hamper some individuals from accessing legal aid services on equal footing with other people. For example, the use of telephones intake relied on in some programmes.

[114] Mkapa, B.W., The Legal System Should be More Accessible and Affordable to More Tanzanians, Law and Justice in Tanzania, 2007, p.40.

[115] Ardalan, S., *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation*, Journal of Law Reform, 2015, Vol. 8, No. 4, p.1001-1038. The financial barriers are among the challenges facing US asylum seekers. In 1996 the restrictions were passed on legal services for immigrants as part of the congressional appropriations bill under the direction of the Republican-led U.S House Representatives. These restrictions prohibited organizations representing asylum seekers and other immigrants from receiving funding from the largest funder of civil legal services in the country known as Legal Services Corporation.

[116] Carmona and Donald (n 81) 20, referring to the responses by the Minister for Justice and Equality to Parliamentary Questions on 21 March 2012 <www.debates.oireachtas.ie/dal/2012/03/21/00317.asp.> (Accessed 04/09/2017).

Besides, the courts, particularly appeal courts, are often located only in capital cities or large towns. Police officers, prosecutors and lawyers are also concentrated in urban areas. Therefore, it is a common problem and problematic for the absence of police and other institutions necessary for the administration of justice in rural and marginalised areas. Hence, a serious problem for the poor to access justice.[117] In this situation, for those with limited mobility such as older persons or people with special needs and those for whom travel is more difficult or dangerous, they are usually greatly affected. Delays in filing cases or reporting complaints are always manifestations of this barrier.

In practice, the need to travel a long distance to reach police stations, court houses for the poorest people, often implies that such people are unable to seek redress for their grievances and have greater difficulty in accessing documents such as birth certificates or land titles that are essential as evidence of their rights when they are contested, for example in land or inheritance proceedings or even in cases of forced evictions. Such distances may also affect the efficacy of the justice system and imply unnecessary delays due to insufficient means to pay for travel costs.

In addition, those who cannot afford to travel long distances (whether they are defendants, claimants, witnesses) are disproportionately impacted when courts are not adaptable and appropriately designed to the needs of persons with physical impairment to ensure their accessibility to court processes. Similarly, in developing countries, police stations and courts are often not wheelchair accessible and more so

[117] Carmona and Donald (n 81) 16.

they suffer from lack of good repair condition. Therefore, people with physical impairment are excluded from accessing to and benefiting from the justice system in absence of measures to facilitate physical access to all and to adapt their processes for those in need.

2.3.4 Institutional Barriers

The institutional barriers to accessing justice exist in various forms among them include monetary costs, excessive delays, nature of the court procedure and corruption.

2.3.4.1 Inadequate Capacity and Resources

The deficit of human and financial resources allocations to courts and insufficient training and capacity building for judicial officers, translate into failures in the judicial system that violate access to justice. Such shortfalls contribute to failure to gather sufficient evidence information as well as delay. Such constraints undermine human rights and challenge the effective functioning of the judicial and adjudication mechanism as a whole. Poor people, women and children are affected massively since pursuing for justice demands greater effort in terms of money and time as there are no likelihood chances of a just and favourable outcome.[118]

2.3.4.2 Excessive Delays

Lack of adequate resources and qualified staff, limited budgets and inadequate infrastructure often cause unnecessary delays in adjudication of cases and enforcement of judgments. In some jurisdictions, millions of legal cases are pending

[118] Carmona and Donald (n 81) 23.

and civil and criminal cases take many years to be completed. Tanzania is not exception. Limited number of advocates and the fact that most of them are mainly situated in large cities and towns makes the situation even worse in as far as access to justice is concerned. In Tanzania, for example, until July 2013, there were 3,639 advocates most of them were based in big cities such as Dar es Salaam, Arusha and Mwanza.[119]

In addition, evidence from Sub-Saharan Africa shows that both civil and criminal cases take up to a decade.[120] However, lengthy delays are not only experienced in the developing countries, but also in some other developed countries. For example, in Italy in 2010, it was found that there were some lengthy delays of cases which were seen as violation of article 6 of the European Convention on Human Rights and Fundamental Freedoms which provides the requirements for a 'fair trial' and which also includes the requirement for the proceeding to be conducted within a reasonable time.[121]

2.3.4.3 Corruption

Corruption has been likened to a disease that eats away the fabric of society.[122] It is manifested in the form of abuse of power or authority for private gain, bribery,

[119] Massay, G. E., 'Adjudication of Land Cases in Tanzania: A Bird Eye Overview of the District Land and Housing Tribunal', A Paper Prepared for Internal Reflections and Discussion at the Land Rights Research and Resources Centre, Dar es Salaam, 2013, pp. 1 and 4.
[120] Carmona and Donald (n 81) 23.
[121] Ibid p. 23.
[122] Systemic corruption within the justice system is commonly defined as the use of public authority gain that results in an improper delivery of judicial services and legal protection for citizens. Corruption is termed by others as a malignant cancer which exists at many different levels in the society. In a democratic country which is based on rule of law, the judiciary is an independent branch, having the role to protect human rights and civil liberties by ensuring the right to a fair trial where all people expect equal access to the courts. See also <<http://pdf.usaid.gov/pdf_docs/Pnact878.pdf> (Accessed 7/09/ 2016).

embezzlement of public funds and nepotism. In so far as courts of law are concerned the consequences of corruption may translate into distortion of evidence and failure to call for interpretation to address a language barrier issue that is apparent in key evidence and key witnesses. In many countries, partly due to insufficient funding for the judicial system, corruption is endemic within police forces and amongst judicial officials.[123] The former President of Tanzania, Mkapa, once stated that:

> *Bribery, and corruption as a whole, is not just a crime; it is also a challenge of development, an attitude of mind. There are no quick fixes; of an institutional or of a legal nature… most of the institutional and legal reforms necessary for success are now in place. But that is not enough. They must be followed up by societal, national and participation.*[124]

For poor people who cannot afford to pay requested bribes for services, their claims and cases are delayed and denied. It is paradoxical to observe that some of the police, prosecutors and magistrates who are expected to be the front liners in the fight against corruption, are found to be among the offenders. Examples are not hard to find. In one case reported by the PCCB investigators (Prevention and Combating of Corruption Bureau) in Dar es Salaam (Tanzania) between 2002 and 2003, the plaintiff complained to the investigators that his employer had convinced him many times to withdraw the case and told him that he had already talked to the magistrate about it.[125]

The plaintiff complained that the case was constantly being adjourned with no tangible reasons. It was learnt that the case had taken four years until he decided to

[123] Ibid. As far as corruption is concerned, the perpetrator must be a person or an individual in authority being involved demanding or accepting favour in exchange for the exercise of authority.
[124] FACEIT and ESRF (2002) The State of Corruption in Tanzania, Annual Report, Dar es salaam, 2002, p.x.
[125] Note that Prevention and Combating Corruption Bureau (PCCB) was formerly known as Prevention of Corruption Bureau. See the historical background for PREVENTION AND COMBATING OF CORRUPTION BUREAU, <http://www.pccb.go.tz/index.php/about-pccb/historical-background> (Accessed 12/05/2016).

give up. He stated as quoted in Swahili language "*Nimeamua kuachana nayo… Mungu atanilipia…*"; meaning that "I have decided to leave the case, God shall reward me."[126] Another example is the case of *DPP v Jaffari Mfaume Kawawa.*[127] It was suspected that someone in the DPP's (Director of Public Prosecutor) office had deliberately hidden the records with a view to frustrating the DPP's right of appeal. There have also been reports of court clerks attempting to extort bribes in exchange for copies of court rulings.[128] Bribes cause a greater burden for the poor people, often meaning that they have to sacrifice their health or education costs in order to meet such demands.

However, evidence shows that globally, women are more likely to be affected by demands for bribes within the justice system, and in many cases, they are also subject to abuse by law enforcement officers.[129] In Burundi, for example, it has often been said that "poverty has a cost" where a '*certificate d'indigence*' is supposed to ensure that people living in poverty benefit from free legal advice and legal fee waivers. However, in practice, the intended beneficiaries face many abuses in trying to obtain this certificate.

The perspective of individuals in many states is that justice can only be obtained by wealthier people. On this regard, 96.8 percent of people in Colombia believe that

---

[126] Paper presented by the PCB researcher in 2002/2003 entitled: "Utafiti: Mahakama Zanuka Rushwa". There has been a lot of efforts and progress under PCCB to fight against corruption. See Marc Nkwame, President Kikwete Praises Hosea's PCCB, DAILY NEWS (Mar. 31, 2012, 2:01 AM), <http://www.dailynews.co.tz/index.php/local-news/3539-president-kikwete-praises-hosea-s-pccb>. (Accessed 10/07/2014).

[127] (1981) LRT149.

[128] Allen (n 109) 258. See 'Low Pay Lures Judiciary Workers Into Corruption - Judge Mchome', GUARDIAN <http://ippmedia.com/frontend/index.php?l=2581>. (Accessed 17/09/2016).

[129] Yusuph, K., *Extortion in Education Sector and Response to Criminal Legal System in Tanzania- A Review*, Asia Pacific Journal of Education, Arts and Sciences, 2006, Vol. 3, No.1, pp 56-63

judges are "bought" by rich claimants, and 88.7 per cent of marginalised people in Chile believe that there is one justice for the poor and another for the rich. Such perception has serious detrimental consequences to people living in poverty as they are deterred from accessing justice.[130] In general, corruption is one of the largest concerns in Tanzania and Africa as a whole.[131]

2.3.5 Procedural Barriers

This part looks at barriers occasioned by formalism and literacy and culture within the purview of procedural requirements relating to judicial process. These can prevent those under privileged society in accessing justice or enjoying equality of arms during judicial proceeding, thus increasing the likelihood of infringing their rights to achieve justice. Due to lack of financial resources to hire a private legal representative or assistance and limitation of legal services, the poor persons are often found navigating the judicial system by themselves. This becomes very problematic to such individuals who encounter complexities labyrinth of laws, traditions and interaction with copious work all of which are likely to impede them from accessing justice and achieving just results.

The following cases and instances are illustrative of formalism and the consequences of strict adherence to it by the courts in access to justice. Take an example of the person who was not well acquainted with language rules for spelling checks. This person, due to failure to appreciate that language requires the name 'Bongole' to be written that way and instead he wrote 'Bogole.' This omission only resulted into

[130] Carmona (n 76) 24.
[131] Bureau of Democracy, Human Rights, and Labour, U.S. Department of State, 2010 human rights report:Tanzania28, available at <http://www.state.gov/documents/organization/160147.pdf. (Accessed 12/09/2017).

striking out of the case at the detriment of the appellant. This example is reflective of the case of *Denise Kasege v The Republic*,[132] whereby the appellant failed to write properly the name of judge Bongole instead he wrote Bogole. Looking at this omission, it is clear that it represents straight forward error on the language use and misspelling of a name. Surprisingly, the justices of the Court of Appeal of Tanzania struck out such an appeal without looking into the grounds of appeal or even the merits of the appeal.

The accused person failed to get his rights only because he did not appreciate the letters of the name 'Bongole'. The ills of formalism are in this case loud and clear. Another good example on this point is the case of *Marwa Kachang'a v The Republic*[133], again this is the Court of Appeal of Tanzania decision. In this case the appellant also failed to appreciate the fact that in rules of language Twaib is different from Twaribu. Instead of writing the name properly, he wrote the name "Twaribu" thinking that the spellings were perfectly in order. The Honourable Justices of the Court of Appeal of Tanzania did not go further to see what were the grounds of appeal. Instead they centred their minds on this language issue of failure to properly spelling the name of the judge and ended up striking out the appeal. Hence, the appellant was returned to custody. As was the other case, this is a typical case showing formalism and the consequence thereof in operation.

Judicial systems that are heavily reliant on paper forms and written pleadings and/complaint undermine the illiterate persons room in accessing justice. The

[132]*Denise Kasege v The Republic* Criminal Appeal No. 359 of 2013, Court of Appeal of Tanzania, Dar es Salaam (unreported).
[133]*Marwa Kachang'a v The Republic* Criminal Appeal No. 84 of 2015, Court of Appeal of Tanzania at Dar es Salaam. (unreported).

majority of those who are excluded from education are often living in poverty. The illiterate persons are greatly impacted to navigate the court system unless they can obtain a legal assistance to represent them in courts where representation through an advocate is obviously expensive to draft for them the required written documents. As mentioned earlier, the requirement is hindered by high fees which are charged by advocates and hence a barrier to them to access justice.[134] It is not surprising that Wanitzek and Twaib observed as follows with regard to illiteracy and ignorance of the law on the party of most unrepresented litigants:

> *The second problem, which is closely connected with language problems and is derived essentially from being governed by a legal culture which is unfamiliar to the people, is the petitioner's ignorance of the law and procedure applicable. In most cases, the strict application of legal rules results in unfavourable consequences and sometimes even injustice to the ignorant party.*[135]

Moreover, inter –cultural communication among different groups in the society and judicial officers can be impeded by differences in perceptions of politeness; cultural taboos which hinder them from giving certain evidence and as a result, resort to other methods to give evidence. For example, in one of the research, it is illustrated that, the Australian indigenous persons under questioning in criminal trials normally adopt a method known as 'gratuitous concurrence', where they answer by responding 'yes' to questions which meant 'yes, I hear you'.[136]

Nevertheless, due to lack of legal knowledge and the complexity of court proceedings, it has been argued that, some of the individual groups in the society

[134] Carmona and Donald (n 81) 28.
[135] Wanitzek and Twaib (n 4) 125.
[136] Ibid.

prefer to resolve their disputes within their own communities rather than going to the court.[137] Also, some members of the families still feel ashamed to bring their claims in court against their own spouses or other members of the families despite the many campaigns on public awareness. Instead, they prefer to solve their matters amicably at home. Due to culture and high rate of illiteracy, accessing justice through court system for most people is not an option and where they opt for it they are likely to misrepresent their claims.[138]

2.3.6 Language Barrier

Language is a dynamic element, which plays a vital role in the adjudication process. It is the core foundation for justice. The language of law is obscured because of its jargons and ambiguous words. Despite its jargons, it is not unusual for such language not to be understood by accused or a litigant. The language of the law in Tanzania is predominantly English although Kiswahili is also marginally used.[139] Most of legal English terminologies originate from Latin, English and French.[140] This makes it difficult for laypersons to understand the language of the law. This also means that, to speak legal English as means of communicating is in itself paralysing communication. This is because, the language of the law is highly technical something which defeats the purpose of being informative and persuasive.

---

[137] See an interview by Samahela to Dr. Steven Bwana, a former Judge of the Court of Appeal of Tanzania broadcasted on 02/08/2017 on the ITV. The retired judge gave an example of the Masai in Arusha, Tanzania who normally resolve some of their disputes within their clans instead of bringing their disputes in courts.

[138] Guruswamy (n 83) 4.

[139] Language of law and how it is used in courts of law is extensively and critically discussed in chapter four of this study in relation to issues of language barrier.

[140] Ashipu, and Umukoro (n 58).

Therefore, without a legal practitioner, the layperson is impeded to interpret the language of the law. [141] As such, most court jurisprudence discourse suggests that language barrier is often identified as the most frequent impediment in accessing justice. Primarily, a legal discourse depends solely on verbal and written communication by employing various measures in accessing justice. For example, if the litigant is unrepresented and does not understand the court language or if there is limitation in communication by language difficulties existing between the advocate and the litigant and the court, then the use of an interpreter is required.[142]

This means that, in the presence of an interpreter, the magistrate will heavily rely on the interpreter's efficiency in the due course of interpretation to keep the court proceedings accurate.[143] Without the service of an interpreter or translator, the litigant will not be able to participate and follow what is going on in court. As a result, such litigant may lose the case. In the context of Tanzania where Kiswahili is widely spoken the use of Kiswahili might also not be free from barriers as Kiswahili used in court proceedings might not necessarily reflect Kiswahili used by the ordinary people in the community. Without proper use of Kiswahili and policy for its use in courts, the way it is being used may very well breed barriers. In more or similar terms, it has elsewhere been stated that:

---

[141] Ibid.

[142] See for instance Odhiabo, et al (n 54) 911. Notably, the concept of interpretation is dealt with at length in the subsequent part of this chapter.

[143] English is the official language of communication in the Kenyan legal system. According to the Judicature Act Cap 8, Section 194 (4) of the Criminal Procedure Code, and Section 86 (1) of the Criminal Procedure Act, it is stated that: English shall be the official language of communication in the country's courts. Interpretation is provided for when dealing with litigants who do not understand English. Notably, English language is used in the Higher Courts. On the other hand, the language of the Lower Court in Kenya is either English or Kiswahili which depends upon the language competence of the judicial officers and the language setting. Similarly, in Tanzania, it is provided under the Tanzania Magistrates Courts' [Cap. 11 R.E 2002]. Act that the language in all proceedings and judgments in upper courts are written in English language save for Primary Courts in which all the court records and the proceedings are in Kiswahili language.

> *An examination of these matters would demonstrate that even the use of an indigenous national language, such as Kiswahili in Tanzania, may still not reflect the realities of a particular cultural and linguistic community where its own vernacular is used to describe its legal institutions. In such cases, the local people may have their own legal concepts, which are either absent at the national level, in which case the use of terms becomes difficult, or considered altogether inappropriate in the context of national legal policy.*[144]

As to the implication of language barrier during court proceedings, and in giving ultimate remedy an example from Haiti where French is the language of the court is worth noting. For most litigants who speak Haitian Creole, often a judge asks questions in Haitian Creole and the clerk must record the answers that constitute declarations in French, since the proceedings of the court must be taken and recorded in French.[145] By doing so, there is likelihood of creating a potential problem of misinterpretation or bad translation that could jeopardise the victim's case at the trial stage. Indeed, this problem disfranchises the victim from being able to correct the record when the judge dictates the victim's declaration to the clerk in French.[146] If the testifying individual does not have an attorney to review and approve the declaration for signature at the conclusion of the hearing, there is a risk that the declaration inaccurately reflects the responses and meanings of the witness's testimony.

As such, in some cases, there are claims, which have been reported to have shocked the witnesses by what is read as their declaration at trial because the clerk misinterpreted or misrepresented the evidence which was given by the witness at the

---

[144] Wanitzek and Twaib (n 4) 127. The use of Kiswahili vocabularies such as "*amri*", "*mdai*", "*dai*", "*hoja*", "*pingamizi*", *kukaza hukumu,*" "SM" , "SU" and "*wadaawa*" in the context of court proceedings, may not be easily understood by ordinary people in the community who seem to be knowledgeable in Kiswahili. The latter saves as illustration of how the use of Kiswahili may also generate barrier of some kind.

[145] Jagannath, M. (n 110) 44.

[146] Ibid.

hearing.[147] Language barrier also hinders the asylum seekers from effectively telling their stories and prevents them from gathering the evidence necessary to carry their burden of proof.[148] Unfortunately, in many states, the services of interpreters and translators for low-income litigants are authorised only in criminal proceedings and not in civil proceedings. Even when judicial officers recognise the need to provide court interpreters for civil litigants who cannot afford it, they often fail to provide competent interpreters.[149] The position and implication of language barrier in Tanzania is explained by Stephene with reference to Tanzania land tribunals in the following words:

> *The biggest challenge facing District Land Housing Tribunal (DLHT) is in the use of English language in delivering verdicts, yet it is not understood by many community members in rural areas. Whereas all the proceedings may take place in Kiswahili language, the verdict is given in English language which is a barrier for the majority of rural residents whose command of English language is largely poor or completely lacking. Access to Justice is likely to be hampered by this language barrier.*[150]

2.4 Legal Significance of Language in Access to Justice

The oxygen of law is language and its significance is in the language in which the legal system (legislature and judiciary) of a particular jurisdiction functions. In so far as access to courts of law is concerned, language of law refers to the language in which courts conduct and record their proceedings and write judgments. Law cannot survive without language and so one needs to be careful with the words one chooses.

---

[147] Ibid.

[149] Geminiani, V. , *Language Access in the Courts and Law Enforcement*, Management Information Exchange Journal, 2008, Vol XXII, No 4, pp.36-39.

[150] Stephene, S., Institutional Constraints to Village Land Management in Tanzania, Policy Brief No. 1, Eng 2014 https://agriknowledge.org/downloads/9880vr023. (Accessed 20/03/2017. Section 32 of the Courts (Land Disputes Settlements)Act, 2002 stipulates that, As shown in this work the language of the District Land and Housing Tribunal shall be either English or Kiswahili as the Chairman holding such tribunal may direct except that the record and judgment of the Tribunal shall be in English.

Language is therefore a pertinent subject for consideration in the legal discourse in accessing justice in courts. According to Namakula, the court has an obligation to fully respect these language rights in the process of ensuring justice.[151] The obligation underlines the importance of language in the right of an accused or litigant to a fair trial. This duty is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights.[152]

It is through language in which the rights of the accused or litigant are exercised and secured. It is difficult for an individual to press for justice if he does not understand the language of the court. Realisation of fair trial is hindered by complexities in language, which are manifested in several aspects. Such aspects include translation errors; misrepresentation and cultural distance among the participants in trials, which affect courtroom communication, the presentation of claims and complaints in courts and the presentation and perception of evidence.

For example, the case of *S v Pienaar*,[153] in South Africa, an Africaans speaking accused who could not speak or understand English, faced drug charges and was sentenced in a magistrate court accordingly. During the trial Pienaar asked the counsel, assigned by Government, to withdraw because she only spoke and understood English. The reviewing judge in the Northern Cape Division found that the accused's right to a legal representative with whom he could communicate in his

[151] Namakula (n 4).
[152] Ibid.
[153] 2000 (2) SACR 143 (NC). The Court referred to Canadian jurisprudence, particularly to the Beaulac case *R v Beaulac* (1999). (1) SCR.

own language, whether directly or through the services of an interpreter, was not properly explained to the accused. According to the court the failure resulted in a breach of the accused's right to a fair trial. The accused's defense had thus not been properly examined and the conviction and sentence were set aside.

With regard to the foregoing, it was a fundamental right for the accused person not only to have a legal representative, provided by government, but also to be represented by a legal representative with whom he could communicate in Afrikaans. The court referred to Canadian jurisprudence, particularly to the case of *R v Beaulac (1999*). The Supreme Court, per judge Bastarache, determined that the language choice of an accused "is substantive right and not a procedural one that can be interfered with." [154]

The significance of language rights was emphasised by the Supreme Court. In the case of *Ford v Quebec (1998),* quoted with approval by Judge Bastarache, it is stated:

> *Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which the individual expresses his or her personal identity and sense of individuality expresses his or her personal identity and sense of individuality.*[155]

Therefore, language right is a fundamental human right more than a communication right. This serves to introduce the concept of language fair trial rights as priority right whose basis is dealt with at length in chapter three of this study and discussed

[154] Lubbe, H.J (n 20) pp. 377-382.
[155] Ibid citing *S v Piennar 2000*, paragraph 8 as per Judge Bastarache, p.383.

at chapter four of this study in the context of language use in Mainland Tanzania courts.

2.5 The Concept of Language Interpretation in Accessing Justice

Language interpretation in court is a means of overcoming language barrier. It is considered as a fundamental rule of justice for anyone who does not understand the language of the court to be provided with an interpreter.[156] Such right was first enunciated in 1929 by Kennedy CJ in *Attorney General v Joyce and Walsh,*[157] when he dealt with the right of an Irish-speaking party to have the case heard through Irish. His Lordship said:

> *It would seem to me to be a requisite of natural justice, particularly in a criminal trial, that a witness should be allowed to give evidence in the language which is his or her vernacular language, whether that language be Irish or English, or any foreign language; and it would follow, if the language used should not be a language known to the members of the Court, that means of interpreting the language to the Court (Judge and jury), and also, in the case of evidence against a prisoner, that means of interpreting it to the prisoner, should be provided.*[158]

A person who makes such interpretation in courts is a court interpreter. He is a person therefore who makes communication between the legal actors possible. A court interpreter is a language mediator or language conduit whose presence and participation allows an individual who is not conversant with the language of the court to meaningfully participate in the court proceedings. In other words, an

[156] Karton (n 4); Grabau, C. M., and Gibbons, L. J., *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation,* New Eng.. L. Rev., 1996, Vol. 30, p.22; Berk –Seligson, S., *The Importance of Linguistics in Court Interpreting,* La Raza Law Journal,1988, Vol.2, pp.14-48.. Berk-Seligson describes a court interpreter as a person who makes communication between the legal actors possible. Note also that entitlement for provision of sign language interpreters to persons who have hearing impairment or low vision or more or less similar impairments are also common in most jurisdiction with a view to eliminating barriers. On such entitlement, see Possi, A, 'Persons with Disability's Right to Work in Africa: A Comparative Study of Employment and Disability Laws, Policies and Relevant Institutional Mechanisms of Tanzania and Selected African States', PhD Thesis, Friedrich-Alexander-Universität Erlangen-Nürnberg, Germany, 2014, p. 185.

[157] [1929] I.R. 526 (S.C.).

[158] [1929] I.R. 526, at 531 (S.C.). This case was also cited in Bacik, I., *Breaking the Language Barrier: Access to Justice in the New Ireland,* Judicial Studies Institute Journal, 2007, Vol. 2, pp. 109-123, p. 115.

interpreter is a person who conveys the meaning of a word or a group of words from a source language into a target language. It means that, the proper role of an interpreter is to place the non court language speaker, as closely as linguistically possible, in the same situation as the court language speaker in a legal setting. In this respect the court interpreter should not give any advantage or disadvantage to the non court language speaking witness or litigant or accused. Such an interpreter is not permitted to improve, edit, omit, add meaning or context to the word or words spoken.[159]Describing the role of a court interpreter and what is expected of him, Berk –Seligson states thus:

> *The interpreter serves two important functions related to the communication of testimony. First, the interpreter serves to make foreign language testimony intelligible to attorneys, judges and jurors, and to make the English questions of attorneys and judges intelligible to the non-English speaking witness or defendant who is testifying. Second, she must interpret the English testimony of witnesses so that it is comprehensible to the non-English speaking defendant. Ideally, interpretation into the target language should be as nearly equivalent to the source language as possible, that is to say, what was originally said in Spanish, for example, should emerge as close in meaning as possible in the English interpretation, and vice versa. Unfortunately, such a high fidelity rendition frequently fails to emerge.*[160]

Indeed, the court interpreter is an impartial officer of the court directly under the control and supervision of a judicial officer presiding over a trial of a case. Therefore, the presiding judicial officer has an obligation to ensure that the interpreter performs his duties accurately, fairly, impartially and ethically. It would appear that the presiding judicial officer must be familiar with the responsibilities of

---

[159]Grabau and Gibbons (n 156) 227, 232 and 233.The author stated *inter alia* that "The court interpreter is required to maintain the same register, or level of language spoken, and the same style as that of the speaker. A court interpreter is not to tone down, improve, or edit any statements .A court interpreter must always remember that "[t]he true message is often in *how* something is said rather than *what* is said; therefore, the style of a message is as important as its content."

[160]Berk –Seligson (n 156) 14.

a court interpreter and should not accept interpreting services of any bilingual individual or of any helpful spectator in the courtroom without knowing his qualification.[161] This is why a thorough knowledge of law and legal court procedures is required for court interpreters.[162]Although the influence of the court interpreter is powerful, most of the legal scholars and practitioners largely remain unaware of the way interpretation works and the effect of interpretation in court proceedings.[163] Notably, the legal treatments of courtroom interpretation that do exist largely focus on the rights of minority or deaf defendants to have access to the legal services of an interpreter.[164] Nevertheless, there are writings explaining on the significance of interpretation in regard to the functioning of the court. Such writings mention some of the difficulties or errors caused through interpretation.[165]

The terms interpretation and translation are commonly used interchangeably but are not synonymous. Interpretation describes immediate conversion of source (oral or text) orally (or by sign language) whereas translation is the conversion of source (recorded oral, sign or text) to text. In other words, interpretation is oral translation of speech or sign from one language into another language.[166] Gibbons states that:

> *A translator uses different skills than a court interpreter. A translator translates a written document or audiotape recording from one language into a written document in another language. The translated document or transcript may be treated as substantive evidence during*

[161]Grabau and Gibbons (n 156). See also Bacik (n 158) p. 110. According to Bacit, "[t]o be an interpreter, it is not enough to speak two languages well. A trained interpreter must prepare for working in particular fields, such as in the court-room or hospital, by developing a specialised legal or medical vocabulary. Legal or court interpreting is particularly highly specialised."

[162] Berk-Seligson (n 156).

[163]Karton (n 4) 4.

[164]Ibid. See also Odhiambo et al (n 54) 913. This article presents research results of a study which was conducted on language use in subordinate courts in Nyanza Province, Kenya. The study established that ten percent 10% of court interpreters who reported that they have been trained it was not court interpreter training that they attended but sign-language interpreter training.

[165]Ibid, Karton (n 4), Grabau and Gibbons (n 156); and Bacik (n 158) 110.

[166] Ibid.

> *a proceeding and, therefore, must "convey the same impression to the reader [or listener] as the original source language text would.*[167]

Others define translation as the transfer of thoughts and ideas from one language (the source language) into another (the target language), in either written or oral form.[168] On the other hand, interpretation encompasses only oral communication and is defined as situations in which one person speaks in the source language, an interpreter processes this input and produces output in the target language, and another person listens to the interpreted target language version of the original speaker's message.[169]

Consecutive and simultaneous are mainly two types of interpretation, which are commonly used in the courtrooms.[170] Consecutive interpretation refers to a method of communicating a message from one language to another in segments. The interpreter listens to a unit of speech in the source language and then conveys that message into the target language. The interpreter speaks during pauses between the speaker's utterances.[171] Simply, this type of interpretation is often preferred for opening and closing statements. It is also preferred when a judge questions the witness because it provides more time to the interpreter to consider nuances and

[167] Grabau and Gibbons (n 158).
[168] Karton (n 4)17. The definition is provided in part three under the history and mechanics of courtroom interpretation.
[169] Ibid. See also Bacik, (n. 158) 110. Explaining the meaning and difference between a translator and an interpreter Bacik writes thus: "To be a translator means having the key skill of understanding two languages. Translators are office or home based and works using dictionaries, internet sources and translation memories. By contrast, interpreters work with and through the spoken language, performing their functions in a range of different environments and locations. They can provide interpreting services in a number of different ways."
[170] The third type of interpretation is known as sight interpretation or termed by others as sight translation. It refers to oral interpretation of a written document. It involves the spontaneous oral rendering into the target language of written materials from the source language. This type of interpretation is not often used in courtroom, for accuracy, the documents are translated in advance.
[171] Karton (n 4)18.

therefore is more precise.[172] Simultaneous interpretation lags slightly behind the source language speaker, interpreting the message into the target language at almost the same time as the original message is being said. Nevertheless, simultaneous interpretation is performed for the defendants benefit and this type is also required for examination of witnesses.[173] In general, since consecutive interpretation can be slow, in international criminal trials almost all interpretations are conducted using simultaneous type of interpretation so as to preserve the flow of the translated speech. However, in either consecutive or simultaneous, the interpreter must be able to work speedily.[174]

Among the elements the interpreter should possess includes; first, interpreters must engage in "attending" as oppose to hearing.[175] This refers to the most deliberate form of listening in order to process the message being said. By doing so, the interpreter will be able to reformulate in the target language. Secondly, the interpreters must be able to work promptly and finally, the interpreters should be careful not to editorialise so as to avoid distorting the meaning uttered by the parties. In addition, there are qualifications provided in some jurisdictions of the professional court interpreter which includes; [176]

(i) high level of mastery of two languages;

---

[172] Ibid.

[173] Examination of witnesses usually involves a rapid back and forth and conversational flow in which simultaneous interpretation appears to be more suitable to be used. Moreover, simultaneous interpretation can be conducted without with or without the aid of electronic device. In this case it involves the interpreter standing next to the witness and whispering in his or her ear which is known as *chucotage.*

[174] Karton (n 4)21.

[175] Ibid 22.

[176] See Judicial Council of California: Court Language Access, Support Program, <http://www.courts.ca.gov/documents/cip-Self-Assessment-Qualifications.pdf> (Accessed 17/09/2016).

(ii) display wide general knowledge characteristic of what a minimum of two years of general education at a college or university would provide; and

(iii) perform the three major types of court interpreting: consecutive interpreting, simultaneous interpreting, and sight interpretation/translation.

It has been argued that having unqualified interpreter is more dangerous in some circumstances than having no interpreters at all. This is because interpretation given by such interpreter deceives both the court, officers of the court, litigants, accused persons and their witnesses.

There is yet another aspect of interpretation in which interpreting into one's native language has some advantage to eliminate difficulties, which arises from the interpreter's accent.[177] In multilingual international courtrooms, a bank of interpreters sits either in the courtroom or in the separate soundproof booths so as to reduce the effects of noise in the surrounding atmosphere and also they are able to visualise the witnesses and the lawyers.[178] There are also team of interpreters, which includes at least one interpreter for each source and target language spoken in the trial. A backup interpreter is present for each one interpreting concurrently, ready to step in if the interpreter falters and to alternate at regular intervals.[179]

Moreover, there is a "monitor" who is termed as supervisor. Such supervisor is always present and listens to various interpretations taking place. His task is to assist in managing interruptions, check for errors, and direct the switching –off

[177]Karton (n 4).
[178]Ibid.
[179] Ibid.

interpreters.[180] There is no doubt that this is among the best practices which can be adopted in most jurisdictions to ensure that interpretation is efficiently conducted. Failure to conduct interpretation efficiently and a complete failure to conduct interpretation in appropriate cases are always fatal to the proceedings. The consequence of a failure to provide adequate interpretation during a criminal trial was dealt with in Ireland in 1939 in *State (Buchan) v Coyne.*[181]In this case, a district Judge had refused to order the interpretation into English of police evidence tendered through Irish, although the defendant could not speak Irish. Sullivan C.J. was highly critical of this decision, stating that:

> *It is quite obvious that in this case one of the fundamental principles of the administration of criminal justice has been disregarded and the conviction obtained in it could not possibly stand in any court of law.*

2.6 Theories Explaining Language Use and Barrier

The literature reviewed in the previous chapter identified some theories relevant to the access to justice as it relate to language barrier. These theories are a manifestation of the existence of the problem, its nature and the endeavours as to how the problem might be addressed. Of significance, the theories, in so far as Tanzania is concerned, underlie the historical backdrop which characterises the use of English and Kiswahili and other local language as the languages of law and the court. It is therefore not surprising that the calls for reforms that have been made so far may be consistent with any of such theories.

The first theory states that, Kiswahili is a better solution for quality education and in

[180]Ibid.
[181] (1936) 70 I.L.T.R. 185, at 186 (S.C.)

administration of justice.[182] The theory essentially advocates for the use of Kiswahili as a language of law and courts in Tanzania. Such endeavour, according to the theorists, will improve the administration of justice. The philosophy underlying this theory is that most people in Tanzania speak and understand Kiswahili as opposed to English language.[183] Therefore, those who follow this theory recommend that the law should be taught in Kiswahili rather than English language. They also argue that lack of books written in Kiswahili is not a problem. Some of them are of the view that there are in place adequate material to enable the teaching of the law and use of Kiswahili as the language of law and court record. According to this theory, its implementation depends upon the commitment from the lawyers and political will from the government.[184]

Recently, Bwana JA (retired Judge), strongly argued in support of this theory. He contended that there is need for courts to use Kiswahili language in the administration of justice.[185] He mentioned few countries such as Russia, Bulgaria, and Portugal which use their own national languages. Such respective nations' languages are used in all sectors, in laws and in administration of justice.

Although this theory argues in favour of the use of Kiswahili as a better solution in overcoming the problem of language barrier in accessing justice in the courts of law, it fails to see that there are also some elderly people particularly in rural areas who are also not quite conversant with Kiswahili language. They often use their local

[182] This theory is supported by Mazrui. Rwezaura, B (n 30); Saffari, A J. (n 14); and Ndumbaro, D. (n. 34). See also Hon Justice F. *Twaib in Kurwa Thoma @ Kurwa Rashidi and Another v Republic* Criminal Appeal No. 116 of 2008, High Court, Dar es Salaam (unreported).
[183] Ndumbaro (n 34) and Rwezaura (n 30) pp.30-45.
[184] See n 182.
[185] This information was broadcast on 2nd August 2017 at 1pm East African Time on ITV.

tribal languages such as sukuma, pare, masai, hehe, nyamwezi, haya, and chagga. Further than that, in Tanzania there is diversity of people from foreign countries who are here in Tanzania for investment purposes and not all of them are conversant with languages of the court. For instance, there are some of the Chinese, French, Germans, and Indians who are not conversant with Kiswahili language. This means that even if Kiswahili language were to be the language of all courts, there would still be instances of language barrier being experience from citizens and residents who do not understand Kiswahili language.

The second theory is mainly advocated by the late Mukuyogo.[186] The theory states that law is a subject matter that will remain arcane even if it is taught in Kiswahili.[187] This means the difference will remain in understanding the law between a layperson and a lawyer. That will remain even if the language is understood by both of them, and therefore, they will not comprehend law in the same manner. This is because, there are skills and tools that one acquires while pursuing the law studies, for example, legal methods and rules of interpretation. Although the language of the court is said to be known and understood only to the lawyers because they are trained and have acquired special skills, it would seem to be important to use Kiswahili (the national language) which is known by the majority of Tanzania population. Using Kiswahili is unlike using any other language, which is only understood by a smaller percentage of Tanzania population.

The third theory is advocated by Namakula in her work entitled ‘Language and the

[186] Mukuyogo (n 21)55-81.
[187] Ibid.

Right to Fair Trial Hearing in International Criminal Trials.' The theory argues that language fair trial rights are priority rights situated in the minimum guarantees of trial fairness. According to this theory the court has an obligation to fully respect such rights in the process of ensuring justice. The obligation is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights.

Essentially, the theory insists that the court must ensure that parties concerned can understand and be understood by providing all the necessary translation and interpretation facilities in court.[188] Namakula has however in this theory concentrated only on international criminal justice and in multilingual court room communication. Nevertheless, the theory may very well be applied in the context of municipal law set-up as it is built on the premise of right to fair trial or hearing. As such, this theory could also be employed in civil and criminal justice within the context of national courts.

Finally, the fourth theory is advocated by Karton. The theory has it that during the process of translation, the errors are not just possible but they are inherent to the process. Such errors are not merely a technical problem. They can infringe on the rights of litigants and cause loss of evidence and distortion of witness testimonies, which lead to verdicts based on faulty findings of fact.[189] The theory assumes that all translations and interpretations are characterised by errors, which according to this

[188] Namakula (n 4) 4. In so far as the provision of adequate facilities is concerned, Namakula's theory is consistent with recommendations given by Mwakajinga (n 19) 231 – 234 and Michael (n 39) 16.
[189] Karton (n 4).

study is not always the case. Indeed, occurrence of errors during translation or interpretation is dependent on various circumstances, which may not be the same and present in every case. This means if circumstances that lead to errors, for example, lack of court facilities such as transcribers or having incompetent interpreter are in existence, then the translation or interpretation would necessarily be characterised by errors of translation or interpretation. But on the other hand if such factors will be eliminated, then the translation would necessarily be free from errors. In any event, the theory is useful as it points to the risk of loss of evidence and distortion of witness testimonies in the course of translation or interpretation.

2.7 Conclusion

Language problem exacerbates other existing barriers in accessing justice. It is the main barrier which is addressed in this study and the most significant barrier which is also experienced in the developed countries. Even though, these countries have more resources than the developing countries, yet they still encounter the problem of language barrier. This chapter has explored the concept of access to justice in relation to language barrier. In so doing, the legal significance of language, the concept of language interpretation, theories on language use and other barriers which affect accessing justice in courts were examined. Consequently, access to justice is affected by many barriers but the most crucial one is the language barrier which is increasing rather than decreasing.

The concept of access to justice is wide and vast. The general approach in accessing justice includes the wider social context beside access to courts. It means access to police, law, advice agencies, and ombudsmen. A narrow approach refers to accessing

justice in the judiciary which is dealt with in this study. In this approach, there are scholars who make proposition that access to justice has two dimensions. These dimensions include procedural (having a fair hearing) access and substantive justice (to receive a fair and just remedy). Therefore, it is of vital importance to ensure members of the public have access to justice both in terms of process and substantive outcome.[190] In so doing, addressing the problem of language barrier is a step in the right direction towards enhancing access to justice.

[190] Guruswamy (n 83) 28.

CHAPTER THREE

3.0 INTERNATIONAL ASPECTS OF LANGUAGE USE IN COURTS

3.1 Introduction

Language is not everything in accessing justice, but without language, everything is nothing in a bid to access justice. Language used in court is a major determinant of the direction of court proceedings and eventual dispensing of justice. Failure to understand language used in court proceedings renders justice incomprehensible. However paradoxical and contradictory language and justice juxtaposition may seem, the problem of language barrier in courts is not uncommon in many jurisdictions in the world.

It is not surprising then that human rights regime at international level implies that the language barrier in the access to justice is a human right problem. It is in this regard that the international regime on human rights appears to prescribe for the right of a party to the proceedings to use the language that he understands and the right to interpreters. Although some countries have endeavoured to rectify the situation by dealing with language barrier in courts in compliance with the international human rights law, other jurisdictions have not done anything significant to the extent that they still face serious challenges on language use in courts.

This chapter intends to demonstrate the extent to which the essence of language as a medium of accessing justice is internationally recognised and how far international instruments have responded to the problem. The chapter mainly revisits the existing international human rights instruments as they relate to language use and the essence of language use in access to justice. The jurisprudence emerging from the application

and enforcement of such instruments is also discussed in this chapter. The chapter also sets the premise from which language fair trial rights emerge as priority rights situated in the minimum guarantees of trial fairness.[191]

3.2 Language Use as a Human Right Aspect

Language is central to culture, identity and heritage. Language and law are inseparable as the law uses words for its existence. The right to use one's own language is recognised as a human right. The international human rights instruments provide a basic regime of language rights. Language is one of the irrefutable key elements of human interaction. It enables all human beings to have interaction among their family, members of the community, government and the whole world at large.

When an individual or a group has a claim, it tends to be formulated in a rights-discourse. Unquestionably, the rights-discourse has proven very valuable for many groups in recent decades. It is an acknowledged fact that, there are different reasons of using foreign language as the language of courts of law. One of the reasons, particularly in Africa, is the influence of colonialism. When most of the African states took political control over their countries from former colonisers, they upheld languages of the latter to be used as official languages of states and courts. A good example of this effect is seen in Tanzania, where the use of English language in courts is predominant. However, other countries have realised the importance of using their own native language, which is commonly understood by many people in

[191] Namakula (n 4) 3, 36 and 37.

the country concerned. One example of such country in Africa is Rwanda, which uses Kinyarwanda, French and English as languages of law. As such, all statutes in Rwanda are drafted in the three languages.

However, in courts it is only Kinyarwanda, which is used as the language of the court and court record.[192]Ireland is an example of such countries outside Africa, which have made significant changes in so far as the use of its own local language is concerned. Section 8 of the Irish Official Languages Act, 2003 provides that a person has the right to be heard and to use the Irish language in the courts. Thus, Irish language is, pursuant to article 8 of the Irish constitution, recognised as the first official language. The constitution also allows the legislature to make provisions for the exclusive use of Irish or English in a particular context. The leading case in this regard is *Ó Beoláin v Fahy* [193] where Hardiman, a Judge of the Supreme Court, held that:

> *It is not possible to exclude Irish, which is the national language and at the same time the first official language of the State, from any part of the public discourse of the nation or from any official business of the State or from the official business of any of its members. Nor is it possible in these contexts to treat it in a manner which is less favourable than the way in which the second official language is treated. Neither is it possible to prevent those who are capable and desirous of using Irish in making their case or in communicating from so doing or to disadvantage them when so doing in any national or official context.*[194]

Similar legislation was enacted in the past abolishing the use of any other language except English in the courts of law. With the coming into force of such legislation, all other colonial languages were removed from being used in courts of law. Such

[192]See for example, Organic Law N°03/2009/Ol of 26/05/2009 Modifying and Complementing the Organic Law N° 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal For Rwanda and Other States.
[193]*Ó Beoláin v. Fahy* [2001] 2 I.R. 279.
[194]Ibid.

law, which must be complied with by all courts is still in force in Northern Ireland.[195]

Another place to learn from is England. The equivalents of the above Act are pieces of legislation passed for England and Wales in 1731 and 1733 respectively. As a result of such enactments, all colonial languages were abolished forthwith. In a very general sense, one can say that, such statutes were enacted to primarily address the perceived problem of language barrier caused by the widespread use of legal French and Latin in courts. Generally speaking, such statutes had the effect of excluding autochthonous languages, and thus excluding "the use of any other tongue or language whatsoever". The foregoing begs the question whether such changes are possible in Tanzania and whether it is pragmatic to do so at this particular time. This question will be dealt with towards the end of this study.

3.3 International Indulgence in the Rights to Language Use in Accessing Justice

The recognition of the importance of language rights as human rights traces its essence from cases of language barrier affecting people who do not understand language of the court, which is different from languages they understand well. Examples in this regard are not hard to locate. One instance, which exemplifies such situation, is from one family story found in the report on language barrier to justice in California.[196] The report states that, Estefani's grandparents needed to enrol her in

[195] It is also worth noting that, Ireland was also colonised by French and other nations from 1737. However, the period from 1536 up to 1691 was the first full conquest of the Island by England and its colonisation with Protestant settlers from Britain.

[196] See California Commission on Access to Justice, Language Barriers to Justice in California: A Report of the California Commission on Access to Justice, California, http://www.svcls.org/media/1880/language%20barriers%20to%20justice%20in%20california.pdf. , p. 13 (Accessed 6/12/2016).

school and get her health care. They could not do so without a court order. They went to the court several times. However, they were unable to accurately describe their case in English. When the case was initiated after some delays, which were also occasioned by lack of an interpreter, it became clear that they were pursuing a wrong order. Because the child's medical condition was worsening and the school year approaching, they nearly gave her up to foster care. It was then that they managed to get assistance from court self-help centre, which enabled them to get the assistance of a volunteer interpreter. They consequently, managed to get the appropriate court order.[197]

It is clear from the above story that such delay resulting from language barrier may render one to be time barred in referring to the case in the courts of law. This is because there are time limitations for filing cases in court. Thus, any delay in doing the right action means that one may at the end of the day fail to pursue his right and so such implication affects access to justice.

There is yet another famous family story which summarises the implications of language barrier in access to justice and consequences thereof. The story as succinctly summarised is that one Yao wanted to take her daughter to China to meet her gravely ill grandmother before she died. She could not get her a passport because of a misspelling on her birth certificate. She was not able to properly explain to a court clerks what she needed and was referred to family law for a custody order. After months of delay, she learned that she had not obtained the order she needed to get her daughter's passport. She couldn't wait any longer and went to see her mother

[197] Ibid p.13.

without her daughter. Her mother died shortly thereafter without ever meeting her granddaughter.[198]

In addition, a family's story of Maria's bilingual husband who was physically and verbally abusive. He prohibited her from working or using the phone and locked her in the house. In court, her husband dominated the proceedings and pretended to get her agreement on matters without explaining them to her. This is because she was not assertive enough to let people know she did not understand what was uttered in court. Fortunately, a court self-help centre attorney took her aside and got the real story and assisted her to obtain pro bono representation. [199]

As shown at the beginning, the above examples signify the recognition of the importance of language rights as human rights. However, the review of the current human rights standards reveals a rather meagre result in this respect. The general human rights instruments appear not to have clear provisions on the language rights in relation to access to justice. They only include provisions on the right to a fair trial for certain types of cases. Apparently, such provisions can be inferred as having explicit and implicit consequences for the language use in court proceedings.[200]

Nevertheless, certain deductions can be made from the principle of substantive or real equality against the background of more specific human rights provisions, like the prison rules of the UN and the Council of Europe and certain minority rights

[198] Ibid. There are more than (220) two hundred and twenty languages spoken in California, and (40) forty percent of the state's households speak a language other than English in the home. Published by the same report on California Commission on Access to Justice, p 3.
[199] Ibid p 33.
[200] Article 14 of ICCPR recognises and protects a right to justice and a fair trial. Article 14(1) establishes the ground rules that everyone must be equal before the courts.

standards. Current minority rights standards also contain provisions regarding language use in court proceedings, some of which demand further than the equivalent individual human rights.[201]

As shown above, the language provisions in the articles of the international human rights instruments relate to the right to a fair trial. The components of fair trial are within the spectrum of the right of an accused person to understand the language in which the charges against him are framed.

This right is provided in the Universal Declaration of Human Rights of 1948 and it is acknowledged by other human rights instruments. It is the basis of the right of a party to understand the language used by the court as its medium of communication and thus accessing justice in courts. Fair trial could therefore be said to be the panacea to the problem of language barrier. This sets the premise for language fair trial rights and the argument that such rights are priority rights situated in the minimum guarantees of trial fairness.

3.4 International Responses to Language Barrier in Accessing Justice

As discussed above, the problem of language barrier in the access to justice has to some extent attained international recognition in international human rights instruments. However, such recognition has been largely encompassed in the right to fair hearing with strong emphasis on criminal trials. Indeed, there is no fair hearing if parties, any one of them or the court itself, does not understand the language used in the court processes. In this part, a selection of international human rights instruments

[201] Article 27 of ICCPR mandates the rights of ethnic, religious and linguistic minority to enjoy their own culture, to profess their own religion, and to use their own language.

are examined in order to underscore how they provide for the right of language use in court processes and facilitate access to justice.

3.4.1 UN Declaration on Human Rights, 1948

Article 1 and 2 of the UN declaration on Human Rights (UDHR) guarantees the right of equality and non-discrimination.[202] Article 2 of the UDHR provides inter alia that everyone is entitled to the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.[203]

Although the issue of language is treated as cultural right in some international human rights instruments, the UDHR and subsequent international human rights instruments have not suggested such a division of human rights (as first class and second class, minor and major or whatever classes). Despite the argument that there is no division of human rights, it is a fact that language right cut across and prevail over all other basic human rights.

---

[202] Universal Declaration of Human Rights (UDHR) www.un.org/en/universal-declaration-human-rights/ (Accessed 14/03/2015). Article 1 of the UDHR states that: "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[203] Article 2 of Universal Declaration of Human Rights provides that: " Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

Notably, this division of human rights was just a direct outcome of an ideological division that preoccupied the world at the time the UDHR, the International Convention for Civil and Political Rights, 1966 (ICCPR) and International Convention On Social, Cultural and Economic Rights, 1966 (ICSCER) were being drafted.[204] However, it is important to note that, due to this ideological division, the UDHR had to be drafted and adopted as a mere declaration that would not bind the ideologically divided members of the UN at the time. If the UDHR would have tried to provide differently against each of these two groups of ideology (and hence two different categories of rights), such step would have put its claims of legitimacy open to serious doubts. Both its moral worth and legal value would have vanished if the Declaration had leaned on either or the other side.

What is interesting to modern human rights jurisprudence, at least at the political level, is that while it was possible for the UDHR to provide expressly for socio-economic rights, it was impossible for European states to agree to incorporate them in the European Human Rights Convention that was almost drafted at the same time as the UDHR. This is an interesting issue at this moment because at that time, Western States and their scholars did not regard socio-economic rights as part of human rights.

With regard to the problem of language barrier in accessing justice in courts, which is the main focus in this study, consideration must be given to articles 1, 2, and 10 of the UDHR. Article 1 and 2 of the UDHR lays down the principles of equality. As for

[204]The drafts were presented before the UN General Assembly in 1954 for discussion, in 1966 it was adopted. The International Covenant on Economic, Social and Cultural Rights was adopted shortly before the International Covenant on Civil and Political Rights as a result of diplomatic negotiations.

article 10 of the UDHR, it is to the effect that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Undoubtedly, article 10 of the UDHR provides for a fair trial which necessarily envisages elimination of language barrier in courts of law and hence language fair trial rights. It is not possible to have equality and fairness if one party in the court understands the language used in the court processes while the other party does not. Thus, this provision gives the rights to all parties to understand the language used in courts. It could also be rightly said that the provision envisages the obligation on the part of the court to understand the language used by the litigants and their witnesses in the court processes in order to be able to make a just determination of the rights and obligations of the parties.[205] The latter is crucial in enabling the court to communicate its determination to such parties in a manner that can be clearly and unambiguously understood by them. The corollary of the court's understanding of the language used by the parties is in its ability to record the evidence adduced by the parties as testified and evaluation of the same before making any determinations.

3.4.2 ICCPR- International Convention for Civil and Political Rights, 1966

By virtue of the wording of this international human rights instrument[206] one can witness recognition of the right to dignity, and rules against discrimination. This instrument provides for the requirement of a state which has ratified the instrument and is party to the Covenant to ensure to all individuals within its territory the rights

[205]Namakula (n 4) 3. Namakula rightly argues that the court has an obligation to fully respect these rights in the process of ensuring justice. This duty is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights.

[206] The International Convention for Civil and Political Rights, 1966.

recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to this instrument, each state party must adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present covenant.[207] Examination of the instrument makes it clear that article 14 (1) and (3) of the instrument is in responses to language barrier to the access of justice in the courts of law. Accordingly, article 14 (1) of the instrument partly states as follows:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law……*[208]

Nonetheless, the fairness of this right cannot be guaranteed if the right to an adequate and competent interpreter is not inclusive where the suspect or a party is not conversant with the language of the court or where the court is not conversant with the language used by a litigant or any one of its witnesses. This is no doubt the reason why article 14 (3) of the ICCPR caters for the need to eliminate language barrier in the court processes. In particular and with emphasis to criminal cases, article 14(3) of ICCPR reads as thus:

> *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
> *(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;* [209]

---

[207] Ibid, Article 2.

[208] Generally, Article 14 of the ICCPR identifies and protects a right to justice and a fair trial. Whereas Article 14.1 sets up the ground rules that everyone is equal before the courts and any kind of hearing must be conducted in an open court and the closed hearings are only allowed for reasons of justice, privacy, or national security. These obligations apply to both criminal and civil hearings, and to all courts and tribunals.

[209] In addition, Article 27 of ICCPR states that: "In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in

> *(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*[210]

It is noteworthy that article 14 of the ICCPR is claimed to be particularly complex in nature, as it combines various guarantees with different scopes of application.[211]The first sentence to the first paragraph in article 14 quoted herein above sets out a general guarantee of equality before courts and tribunals that apply article 14 of the ICCPR, regardless of the nature of the proceedings before such bodies. An expansive interpretation of the sentence would also recognise the need to ensuring equal access to all parties regardless of their language use and also ensuring that all parties understand the course of the proceedings despite the language used. In other words, one should not be treated differently simply because he does not understand the language used in the court processes. Rather, he should be accorded equal access just like one who is proficient in the language of the court.

The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are being determined. In such proceedings, the media and the public may be excluded from the hearing only in the cases specified in the third sentence to the first paragraph. The fair

---

community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[210] Thus the law emphasises on the principles of natural justice in regard to the notion of equality and it is more specific once it deals with the issue of justice determination in the determination of any criminal charge to ensure the language is understood by the accused. The law requires further that it is the duty of the state to make sure that the accused person must have free assistance of an interpreter if he cannot understand or speak the language used in court. To ensure they can understand and be understood.

[211] Danish Institute for Human Rights, Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid and Schemes Used in the Region and the Level of Cooperation and Coordination between the Various Actors, A Report by the Danish Institute for Human Rights, Based on Cooperation with the East Africa Law Society, www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf p 19. (Accessed 08/12/2016).

hearing is interpreted to include the right of a party to the proceedings to understand the proceedings notwithstanding, whether or not he understands the language used in the court.[212] It is for such reasons that the role of interpreters becomes necessary when a party does not understand the language used in the court processes.

The above article also provides for right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them. The principle is the first among the minimum guarantee in criminal proceedings provided under paragraph 3 (a) of article 14 of the ICCPR. This guarantee applies to all cases of criminal nature, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.[213]

Notice of the reasons for an arrest is separately guaranteed in Article 9, paragraph 2 of the covenant.[214] The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,[215] or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) of article 14 of the ICCPR may be met by stating the charge either orally - if later confirmed in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, subparagraph 3 (a) of the ICCPR requires that, notwithstanding the absence of the accused, all due steps must

[212] This envisages language fair trial rights as argued by Namakula (n 4) 3, 36 and 37.
[213] *Khachatrian v Armenia*, Communication No. 1056/2002.
[214] *Paul Kelly v Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60(1991).
[215] *Rafael Marques de Morais v Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/ 2002 (2005).

have been taken to inform the accused persons of the charges and to notify them of the proceedings.[216] Clearly, the notification would be meaningless if the same and its contents are not understood by the suspect on account of language barrier.

Needless to say, much as the charge laid against a person must be adequately brought to his attention and knowledge, the same must clearly reflect the offence against which the person is charged with as well as the circumstances under which the same was committed. It is no wonder that it is common place for proceedings to be rendered a nullity on account of a charge which was not properly drawn because of reasons which point to the problem of language barrier on the part of the prosecution side that drew the charge. In such circumstances, it would mean that the charge was not and could not be understood by the accused person. In view of the above, the effective exercise of the rights under article 14 of ICCPR presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him.

As such, it is covenanted that, the provision for the use of one official court language by states parties to the covenant is mandatory. Nonetheless, there is a legal pre-conditional requirement of a fair hearing mandating states parties to make available to a citizen whose mother tongue differs from the official court language. This entails that the accused person must well understand and appreciate the allegations posed on his shoulders. This right cannot be dispensed with. In case it is witnessed that the accused or the defence witnesses have difficulties in understanding or in expressing themselves in the court language, in this context, the services of an

[216] *Daniel Monguya Mbenge v Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 at 76 (1990).

interpreter must be made available. Short of that, there would be breach of fundamental human rights principle.

To make it a reality, some of the human rights provisions under the law state expressly that there is a special body which has been vested and delegated with the interpretation task of some legal provisions.[217] This committee among others makes clarification that the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.

3.4.3 The European Convention on Human Rights

The position in the above ICCPR is consistent with the provisions of article 6 of the European Convention on Human Rights[218] which states at paragraph (2) that everyone "who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."[219] Furthermore, article 6 of the European Convention on Human Rights provides at paragraph (3) that:

> *Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; …*

[217] Human Rights Committee of the International Convention for Civil and Political Rights, 1966.

[218] The European Convention on Human Rights is an international treaty to protect human rights and fundamental freedoms in Europe. It was drafted in 1950 by Council of Europe and came into effect on 03/091953. The Europe Convention on Human Rights and its five protocols include: Protocol 1. Enforcement of certain Rights and Freedoms not included in Section I of the Convention [1952]- PARIS 20 March.; Protocol 2. Conferring upon the European Court of Human Rights Competence to give Advisory Opinions [1963]- STRASBOURG 6 May; Protocol 3. Amending Articles 29, 30, and 94 of the Convention [1963]- STRASBOURG 16 September; Protocol 4. Protecting certain Additional Rights [1963]; Protocol Amending Articles 22 and 40 of the Convention [1966]- STRASBOURG 20 January. Available at http://www.echr.coe.int/Documents/Convention_ ENG.pdfhttp://www.hri.org/docs/ECHR50.html **(**Accessed 09/11/2016)

[219] This article provides for the right to liberty and security.

> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*[220]

It can be rightly observed that the wording of the above provision is almost identical to that of article 14 (3) of ICCPR. Arguably, the emphasis on language rights in the fair trial article and hence language fair trial rights underlines the significance placed upon such rights.

In the case of *Oztürk v the Federal Republic of Germany*, [221]the issue was whether the act in question was or was not a criminal charge because the German authorities wanted to make the applicant pay for his interpreter. However, it was earlier held in *Luedicke, Belkacem and Koç v the Federal Republic of Germany,*[222] that the provision of article 6 (3) (e) of the European Convention on Human Rights and Fundamental Freedoms of 1950[223] absolutely prohibits a defendant being ordered to pay the costs of an interpreter since it provides "neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration". The court further stated that this principle covered "those documents or statements in the proceedings instituted against him which is necessary for him to understand in order to have the benefit of a fair trial." [224]

Nevertheless, in the case of *Lagerblom v Sweden*,[225] the European Court of Human Rights, found no violation of article 6(3)(e) of the European Convention on Human

[220] The right to a 'fair trial Article' of the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) refers to an international treaty to protect human rights and fundamental freedoms in Europe. It was signed on 4th November 1950 and entered into force on September 1953. The Convention played a significant role for the growth and awareness of Human Rights in Europe.
[221] *Oztürk v the Federal Republic of Germany*, 21 February 1984.
[222] *Koç v the Federal Republic of Germany*, 28 November 1978, paras. 40 and 48.
[223] Signed on 4/11/1950 and entered into force on September 1953.
[224] Ibid.
[225] No 26891/95, ECtHR 9 (Fourth Section), judgments (Merits) of 14/01/2003.

Rights (ECHR) as the Finnish applicant's command of Swedish was sufficient to communicate with his Swedish lawyer sufficiently to participate in the proceedings. In any case, interpretation was provided in Finnish during the hearings and when submitting the documents. Thus according to the court, he did have the possibility to use Finnish for many parts of the proceedings.[226]

In contrast, in the case of *Cuscani v United Kingdom*,[227] the applicant was the Italian manager of 'The Godfather' restaurant in Newcastle, and had pleaded guilty to serious tax offences. At the sentencing hearing, his counsel informed the judge that the applicant's "English is poor and his Italian is very Southern". The judge adjourned the case. Although there was no interpreter provided at the next hearing, he proceeded to sentence the applicant on the basis of the defence counsel's assurance that the applicant's brother, who had fairly good English, was present in court and that they would be able to deal with that situation. The Strasbourg court held that there was a violation of his rights[228] given that the judge is "the ultimate guardian of the fairness of the proceedings" and should not have been satisfied with the assurances of the defence counsel, especially because it appeared his client faced difficulties to communicate with him.

The European Commission once clarified the provisions of article 6 of the European Convention on Human Rights in the case of *Isop v Austria.*[229] In this case, the applicant, a member of the Slovene minority in Austria, argued that the state would

[226] Ibid. The Court stated that the right to choose one's lawyer was not absolute when free legal aid is concerned.
[227](2003) 36 E.H.R.R 2
[228] Article 6(1) (e) of the European Convention on Human Rights and Fundamental Freedoms provides that: An accused person is entitled "... to have the free assistance of an interpreter if he cannot understand or speak the language used in court"
[229]*Isop v Austria* (Application No. 808/60, YBECHR5, 1962:108).

violate article 6 in combinations with article 14 because he was not allowed to use the Slovene language in a civil court procedure.[230] The commission underlined that article 6 mentioned above should be interpreted generously in that the right to free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.

The liberal interpretation of the provisions of article 6 of the European Convention on Human Rights is construed to mean that, the attainment of a fair trial includes a linguistic component for civil trials but this would also be confined to ensuring that the person concerned can understand the trial.[231] Understanding the trial means that, the accused person is well acquainted with the language, which is used in the court process. In this case, the European Commission contended that the applicant spoke and understood German, as such article 6.1 guarantees a right to be able to put a case in court of law, and not a right to be heard in one's own language. In criminal cases, if an accused does not understand the language used in court, he should be provided with an interpreter. For those reasons, the European Commission did not establish a violation of article 6 and maintained that article 14 was also not applicable. The commission held as follow:

> *"In order validly to invoke Article 14, the applicant would therefore have to show that the convention gave him the right to file a criminal suit in the Slovene language and also that this right was denied because he belonged to a Slovene minority."*[232]

This holding reveals not only that the linguistic guarantee of the right to a fair trial is limited to a language one understands, but also in any event, it is impossible to

[230] Ibid.
[231] Arguably, this position creates a basis for application of provisions for interpretation in civil cases.
[232] n 229.

achieve absolute equality, between a defendant who understands the language of the court and one who does not. The commission was of the view that seeking to achieve absolute equality would be a particularly burdensome requirement. It would be an extremely long and costly process to translate every single document and to have on every occasion simultaneous translation.

3.4.4 The American Convention on Human Rights of 1969

In addition to the above regional context, article 8(2) (a) of the American Convention on Human Rights of 1969,[233]stipulates that, the accused person has the right to be assisted without charge by translator or interpreter, if he does not understand or does not speak the language of the tribunal or court. In the same manner, it is enshrined under article 6 (3) (e) of the European Convention on Human Rights,[234] that the accused is entitled to free assistance of an interpreter if he cannot understand or speak the language used in court.

3.4.5 International Convention on Social, Cultural and Economic Rights, ICSCER -1966

Socio-economic rights include the right to an adequate standard of living; the right to housing and to education; the right to work and to equal pay for equal work; and the rights of minorities to enjoy their own culture, to practise their own religion and communicate in their own language. The specific international human rights instrument that comprehensively catalogues these rights is the International

[233] Article 8(2) (a) of the American Convention on Human Rights (Pact of San Jose) signed 22 November 1969, entered into force 18 July 1978, 1144 UNTS 123.
[234] All Council of Europe member states are party to the Convention.

Covenant on Economic, Social and Cultural Rights of 1966 (ICSCER).[235] One of the rights mentioned under ICSCER is the right to communicate in one's own language. The wording supplements with what is contended in other international human rights instruments by espousing people to use their language, which they understand to communicate.

3.5 Perspective of African Human Rights Instruments

There are different African human rights instruments adopted by the then OAU as well as the AU. This part will only concentrate on the provisions of African Charter for Human and Peoples' Rights (ACHPR),[236] dealing with the aspect of language in the process of justice administration. The Charter has an international human rights flavour that is intended to promote and protect human rights and basic freedoms in the African continent.[237]The interpretation and oversight of the Charter are the core of the African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. As the commission itself acknowledges, "[t]he uniqueness of the African situation and the special qualities of

---

[235] However, these rights are also contained in other international human rights instruments, such as the UN Convention on the Rights of the Child of 1989 (CRC), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights of 1981 and the African Charter on the Rights and Welfare of the State of 1990.

[236] The African Charter for Human and Peoples Rights establishes African Commission on Human and Peoples' Rights, http://www.achpr.org/instruments/achpr/ , (Accessed 20/12/2015).

[237]Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 3:

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:
   (i) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
   (ii)The right to be presumed innocent until proved guilty by a competent court or tribunal;
   (iii) The right to defence, including the right to be defended by counsel of his choice;
   (iv) The right to be tried within a reasonable time by an impartial court or tribunal.

the African Charter . . . imposes upon the African Commission an important task."[238] In 1998, a protocol to the Charter was subsequently adopted whereby an African Court on Human and Peoples' Rights was created. On 25 January 2005, the protocol came into effect. Despite some shortcomings, the commission has done a remarkable job insofar as the right to fair trial is concerned.[239] In this respect, it is argued that the commission has had significant contribution in developing the international law on fair trial which also embodies the right of a party to use the language he understands and the right to have an interpreter. This marks the recognition by the commission of language fair trial rights. Indeed, the commission's resolutions and case law on fair trial are inspiring, and have since contributed to an enhanced understanding of the normative implications of many of the provisions contained in the African Charter.[240]

It is worth noting that the African commission follows largely the principles already established by the European Court. However, the African Charter does not provide specific provisions for the right to interpretation where the accused in criminal trials does not understand or speak the language of the domestic court or legal assistance where the accused lacks sufficient means. Nonetheless, the African Human Rights System through various provisions of the resolution on the right to fair trial and legal assistance has established these guarantees. Therefore, an accused has the right to

---

[238] *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)*. Also available at www.ahrlj.up.ac.za/udombana-nj (Accessed 10/12/2016).

[239] See *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995). *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995); Constitutional Rights Project (in respect of *Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995); *Achuthan and another (on behalf of Banda and Others) v Malawi (2000) AHRLR 143 (ACHPR 1994)*; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria (2000) AHRLR 183 (ACHPR 1995)*.

[240] Udombana, N., *The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa*, African Human Rights Law Journal, 2006, Vol. 6, No 2, pp 330-332.

free assistance of an interpreter if he cannot speak or understand the language use by the court.

In the case of *Malawi African Association v. Mauritania,*[241]where out of twenty one (21) accused persons only three (3) spoke fluently in Arabic the language of the court. It was held by the commission that the remaining eighteen (18) accused persons did not obtain a fair hearing because they did not have the benefit of interpretation to them of the proceedings in the familiar language.[242]

In a similar situation in Africa, *Umaru v Federal Republic of Nigeria,* [243]held that the requirement of a valid arraignment under section 36 (6) (e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) makes it mandatory that the accused person who is standing trial for an offence in criminal trials and does not understand the language of the court shall be entitled to have an assistance of an interpreter without payment.

3.6 Recognition and Use of African Languages

Despite the fact that majority of African countries were colonised by Europeans and still use their colonial masters' languages as the languages of their respective courts, they have under the umbrella of the then OAU since 1963 and now AU endeavoured to use African languages as the working languages of the organization/union and all its institutions. However, the use of such languages is permissible in so far as the

[241]*Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000). See also Heyns, C., and Killander, M., (ed), Compendium of Key Human Rights Documents of the African Union, Fourth Edition, Pretoria University Law Press, Pretoria, 2010, p. 307.
[242] Heyns and Killander (n 254) 307-310
[243]*Umaru v Federal Republic of Nigeria* (2013) LPELR-20192(CA).

prevailing circumstances would permit.

The fact that as early as the year 1963, such a call had been made it indicates the language commitment that the African continent has had since the time most of such countries attained their independence. A number of subsequent Charters, Action Plans and Declarations have since 1963 followed suit.

These are: Cultural Charter (1976), Lagos Plan of Action (1980); Language Plan of Action (1986), Harare Declaration (1997), Lome, Durban and Maputo (2000, 2002, 2003). Nevertheless, the most recent declaration is the Dar es Salaam Declaration for the GLR (Great Lakes Region)[244] which focused on the use of Kiswahili as a working language for the region. All these instruments provide a legal basis for the use of Kiswahili as a working language in the GLR.

The endeavour to use African languages as working languages of the AU was given impetus in July 2004 during the AU meeting in Addis Ababa. In that meeting, the heads of state and delegates from Tanzania, Mozambique, Burundi, Democratic Republic of Congo, Kenya, the Comoros, Rwanda and Uganda gave their speeches and presentations in Kiswahili as one of African languages. This was a move that further proved that African languages and Kiswahili in particular can function well as working languages in presentations and deliberations in such forums like that of the AU summit and now in GLR forums.

[244]The African Great Lakes Region consists of countries that surround the African Great Lakes. It consists of Burundi, the Democratic Republic of Congo, Rwanda, Uganda, Kenya and Tanzania.

By reading between the lines of the provisions of article 74 of the Dar es Salaam Declaration for the GLR (Great Lakes Region) one can witness that it was enacted with the intention of promoting the use of Kiswahili as a working language in the Great Lakes Region. Soon after the enactment of the above mentioned legal declaration, the countries in the Great Lakes Region made recommendable efforts which resulted into the formation of Pan-African Kiswahili Association,[245] and a regional organization[246] that brings together all university lecturers and professors of Kiswahili from East and Central Africa.

In the same vein, moves are underway to form what will be known as an authoritative body[247] that will unite all East African National Kiswahili Councils into one, and an organization that will concern itself mainly with the standardization of the language to suit the needs of the East and Central African people. Nonetheless, literature has revealed that, although Kiswahili serves a vital role in the East African integration, it faces a number of challenges as a language. It is interesting to note that as one of the East African countries, Tanzania has given Kiswahili more social-political goodwill. Explicit policies have been articulated and to a reasonable extent implemented through the use of this language. Tanzania has been witnessing the establishment of institutions to deal with Kiswahili, some of them being TATAKI (Taasisi ya Taaluma za Kiswahili), National Kiswahili Council (Baraza la Kiswahili la Taifa) just to mention a few.

---

[245] This association can also be termed as *Chama cha Kiswahili cha Afrika known in its acronym as* (CHAKA)

[246] This regional Kiswahili Organization is termed as *Chama cha Kiswahili cha Afrika Mashariki* (CHAKAMA)

[247] This body will act as a Council for all Kiswahili organisations in East Africa. In Kiswahili, this body will be known as *Baraza la Kiswahili la Afrika Mashariki*.

3.7 Conclusion

This chapter has fairly attempted to analyse the international human rights aspects of language use in courts and the essence of the language use in accessing justice. It has also set the international premise for language fair trial rights as priority rights situated in the minimum guarantees of trial fairness; hence clarifying the stance of language rights in court proceedings as advocated by Namakula.[248]From the international perspectives, it has been revealed that, internationally, language use has great importance in accessing justice and is a component of fair trial which each jurisdiction must strive to attain. Although the thrust of the international human rights is ostensibly on criminal proceedings, by necessary implication, such component is also applicable and relevant to non-criminal proceedings as interpreted by the European Commission.

The international instruments discussed above also envisage availability of interpreters who would be called upon to interpret the language used in the court to a litigant or accused person who does not understand the language used by the court. This implies that such interpreter should as well understand the language that such litigant or accused person understands in addition to the language of the court. Clearly, however, such instruments do not provide in clear terms the duties, qualifications and the manner in which the interpretation should be conducted. They do not also provide any significant guideline for translation which is different from interpretation.

[248]Namakula, C.S (n 4).

To sum up the above discussion, language is the core foundation for justice.[249] Generally, there has been increasing awareness at international level of the importance of language in ensuring access to justice, and the right of access to the courts in a language one understands has come to be more universally seen as a human right. To many lawyers including courts of law, the role of procedure is reaching just decisions. One of the good examples is the case of *Airey v Ireland*, [250]in which the question was whether the applicant's appearance before the Irish High Court without the assistance of a lawyer would be effective. That is to say, whether she would be able to present her case properly if her husband was represented by a counsel and she was not. The court held that in view of the complexity of the procedure before the High Court, the applicant would be disadvantaged. Indeed, if language of the court is not understood during the court proceedings, justice will naturally be defeated.

[249] This refers to the concept on the rules of natural justice, the twin pillars of which are *audi alteram partem* – meaning the other party must be heard and *nemo judex in causa sua* – meaning "never be a judge in your own case".
[250]*Airey v Ireland* (1979) 2 EHRR 305.

CHAPTER FOUR

4.0 LEGAL FRAMEWORK FOR LANGUAGE USE AND LANGUAGE FAIR TRIAL RIGHTS IN TANZANIAN COURTS

4.1 Introduction

Language is one of effective ways of communicating. It is the medium through which individuals acquire all values that govern society and that forms the basis for laws.[251] Tanzania is a multilingual country with many vernacular languages, which are the first languages to people particularly those residing in rural areas. In such a heterogeneous society, language issues in official communication become intricate as those who do not understand languages designated as official are discriminated against.[252] Language use in Tanzanian courts of law is a subject which is provided for and regulated by the law.

The law provides for specific languages namely, Kiswahili and English which are official languages of courts. There are provisions for interpreters for those who do not understand language used by the court. Courts are therefore multilingual in nature. It is against the above background of the use of various languages that this chapter examines the legal framework for the use of language in courts in Mainland Tanzania. In so doing, the chapter explores various legal aspects of language use in court proceedings and the potential for language barrier that is inherent in the regime.

[251] Wanitzek and Twaib (n 4) 118.
[252] Odhiambo, et al (n 54) 910-918.

4.2 Plurality of Languages in Tanzania

Language is broadly defined as any organised means of conveying or communicating ideas especially by human speech, written characters or sign language.[253] In the legal context, language is a pervasive and dynamic element that has powerful influences on the legal process. Tanzania is a multilingual country consisting of multi-ethnic population. There are more than 25 tribes and approximately 120 different ethnic groups living in Tanzania, and over 120 vernaculars languages, which are the first languages to the people, particularly those residing in rural areas. However, the Bantu-speaking ones are the majority of all.[254] The major tribes includes for example the Sukuma, Nyamwezi, Haya, Nyakyusa, Chagga, Gogo, Makonde, Hehe, Luguru, Ngoni, Fipa, Bena, Makua, Kaguru, Sambaa, Kurya and Yao.[255] In addition, there a many other small tribes with their own vernaculars languages spoken as first languages by members of such tribes, mostly in rural areas. Although each tribe has its own native language, they are generally united by Kiswahili, the national language.[256]

Despite the general understanding that most of such tribes are united by Kiswahili, the country is not free from people who lack, or have limited, knowledge or understanding of Kiswahili and English.[257] Such situation is not uncommon with elderly illiterate population living in the interior parts of rural Tanzania.[258] Not only that, but also there are other foreign languages that are increasingly being spoken by

[253]Namakula (n 4) 2.
[254]Legal and Human Rights Centre (n 8) 3.
[255]Ibid.
[256] Boshe, P., and Mbezi P, *The Value of Pro bono Services in Accessing Justice in Tanzania,* Open University Law Journal, 2013, Vol.4, No.2, pp. 146-157.
[257] Kiswahili is the national language of Tanzania, which is widely spoken across the country.
[258] Wanitzek and Twaib (n 4) 121.

residents from foreign nations who have limited knowledge of either Kiswahili, English or any of the local tribal languages. The latter is true with globalisation and movement of people from different nations across the globe. The influx of people of Chinese origin is a case in point that serves to illustrate the point. It means therefore that problems may potentially result in court multilingual court room proceedings.

Such proceedings would call for the need to interpret proceedings from one language to Kiswahili and hence instant translation by the court from Kiswahili to English. Such eventualities would stimulate debate on the impact of language diversity on fair hearing in the trial process. This is because the conduct of a trial in more than one language affects the proceedings especially the rights of litigants and accused persons. A multilingual trial raises multiple complexities relating to cross-lingual and cross-cultural communication. Complexities such as misunderstandings, failures in translation, cultural distance among trial participants affect courtroom communication, and the presentation and perception of the evidence, hence challenging the credibility of a trial. The impact of interpretation on proceedings also makes language diversity in the proceedings a fair trial concern.

With the existence of plurality of languages within one and the same country as shown above, one cannot therefore speak of knowledge of 'the' law because a certain law, mostly the African customary law, may be well known to a person or a group of the population, while the official state law remains largely unknown.[259] In effect, therefore, the general populace remains mostly ignorant of the law. Consequently, the claim that everybody is presumed to know the law amounts to nothing but a

[259]Ibid.

fallacy.[260] The foregoing notwithstanding, it is worthwhile to note that Kiswahili and English are two main official languages which are mainly used as lingua franca.[261]Tanzania is clearly featured by triglossia,[262]where Kiswahili is a widespread national language while English is the international language used in higher level of education (from secondary to university), in business and trade, administration, the judiciary and a smaller portion of African languages is spoken at home. [263] As to the language of the law and court, both Kiswahili and English language are used.[264]

4.3 Language of Law and Court

Language of law is the language in which the legal system functions which is composed mainly of the legislature and the judiciary.[265]Section 84 of the Interpretation of Laws Act[266] gives the scope of the language of law in Tanzania. It states as follow:

> *84. Language of the Laws of Tanzania*
> *(1) The language of the laws of Tanzania shall be English or Kiswahili or both.*
> *(2) Where any written law is translated from one language into another and published in both languages, then in the case of conflict or doubt as to the meaning of any word or expression, the version of the language in which the law was enacted shall take precedence.*

---

[260]Ibid 117- 121.

[261]The Swahili name for the language itself is Kiswahili which is sporadically used in English.

[262]Malin, P., 'The Linguistic Situation in Tanzania' file:///C:/Users/job/Downloads/1187-3631-1-PB%20(2).pdf (Accessed 14/03/2016). The word *Triglossia* as referred to by Malin in this paper means (in linguistics) the coexistence of three relative native languages or dialects among certain population.

[263] Ibid. English is not known by many. It therefore remains to be a language for few fortunate people in Tanzania who have attained at least secondary level of education.

[264]However, the majority of the laws debated in Kiswahili and passed by the Parliament are available in the English language even though Kiswahili language is the only language spoken and used in debates in the Parliament which language is understood and spoken by the majority of the people in Tanzania.

[265]Wanitzek and Twaib (n. 4) 116. See also, Rwezaura (n 30) 30-45.

[266][Cap. 1 R.E 2002]. The provision underlines the predominance of English over Kiswahili and other languages in Tanzania legal system.

> *(3) Where any written law is enacted in both languages and there occurs a conflict or doubt as to the meaning of any word or expression, the English version shall take precedence.*

Therefore, in practical terms 'the language of the law' can best be explained as follows. Firstly, it refers to the language in which bills and subsidiary legislation are drafted, and then debated and passed in parliament. And secondly, it refers to the language in which courts conduct and record their proceedings, and write their judgments.[267] In view of the above meaning, the language of the law and therefore the court is English or Kiswahili or both. However, the scope as to the use of the languages is stipulated under section 13 of the Magistrates' Courts Act[268]with reference to Primary Courts, District Courts and Resident Magistrates' Courts. The same is to the effect that the language of the Resident Magistrate Courts and District Courts shall be English or Kiswahili.[269] The relevant provision reads thus:

> *13(1) The language of Primary Courts shall be Kiswahili*
> *(2) The language of courts of a resident magistrate and of District Courts shall be either English or Kiswahili or such other language as the magistrate holding such court may direct save that is the exercise of appellate, revisional or confirmatory jurisdiction by a district court (in which case the record and judgment maybe in English or Kiswahili), the record and judgment of the court shall be in English.*

The relevant provision seems to provide room for the use of other languages in such courts as the presiding magistrate may deem it fit. This room departs from the language of the law provided for under section 84 of the Interpretation of Law Act which does not seem to envisage the use of "such other language" as the court may direct. Although there is no guideline in place or rules as to the use of "other language" as the court may deem fit, it would appear that the use of the phrase "other

[267]Ibid. See also United Republic of Tanzania, The Law Reform Commission, Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, 2013.
[268][Cap. 20 R.E 2002].
[269] Magistrates Courts Act [Cap. 20 R.E 2002], s. 13.

language' was meant to cover other languages that are equally spoken in Tanzania communities. This, however, would be possible in actual practice only where the magistrate and the parties have another common language, which may rarely be the case.[270] The provision is also clear that while the said Resident Magistrate Courts and District Courts may use either Kiswahili or English, the record and judgment of the said courts must be in English.[271]The exception is the District Court which in the exercise of its appellate, revisional or confirmatory jurisdiction, its record and judgment maybe in either English or Kiswahili.

Similarly, the language of the High Court is either English or Kiswahili as directed by the trial judge presiding in such court. However, records of judgments or decisions of courts must be in English.[272] Consistent with the position of the law in respect of the Resident Magistrate Courts and District Courts, the language used in the Court of Appeal is also English or Kiswahili but the judgment, order or decision of the court must be in English.[273]As for Primary Court the official language is Kiswahili.[274] It follows also that the record and judgment of the Primary Courts must equally be in Kiswahili.

The law provides for the use of Kiswahili or English, but as a matter of practice in the higher courts, the inclination remains towards the use of English language.[275] As

[270]Wanitzek and Twaib (n 4) 121. Presently, there is no policy guideline to direct presiding district magistrate or resident magistrate to the use of 'other language' as the language of the court in court proceedings. Since language of the court record is English, the court will have to record the proceedings and write judgments in English regardless of the use of 'other language'.
[271]Ibid.
[272]Language of Court Rules, GN 115 of 1981. See also, Language of the Court Rules, GN. No. 307 of 1964 as amended in 1996. It is important to note that the Language of the Court Rules refers to the High Court only and not to subordinate Courts.
[273]Tanzania Court of Appeal Rules 2009, rule 5.
[274] Magistrates Courts Act [Cap. 20 R.E 2002], s. 13(1).
[275] Wanitzek and Twaib (n 4) 118.

a result, presiding judicial officers ordinarily record proceedings in English even if the same are conducted in Kiswahili or in other language.[276] This seems to be the case because English remains the language of court records save for Primary Courts. The Law Reform Commission of Tanzania has had opportunity to address this practice of the courts conducting proceedings in Kiswahili and maintaining their records in English. In so doing, the commission appeared to defend the use of English as the language of record as opposed to Kiswahili. The commission said:

> *As a matter of policy, all courts permit parties to address the Court in Swahili or English or both interchangeably. The law simply requires records to be kept in English for obvious reasons. It is noted that the decisions of the High Court and Court of Appeal are being used as precedents in the courts in other commonwealth jurisdictions. English is the most widely used language globally and no one wants to be left behind. To insist that Swahili should be the only language in all aspects of judicial proceedings is hard to justify. Above all, it will aggravate the lack of command and proficiency of English language by our lawyers.*[277] *(Emphasis supplied).*

This practice however lacks clear guideline as to what the record should adhere to. To make things worse, the law is silent on how a presiding judicial officer should take and record court proceedings. The relevant law does not state that the record should indicate that the proceedings were conducted in Kiswahili and instantly and manually translated by the trial presiding judicial officer in English. The law does not also require the court to take and keep the original Kiswahili account that transpired in the court proceedings for reference in the event of a dispute or want of clarity. Since proceedings in the Primary Courts are conducted in Kiswahili and recorded in Kiswahili, the upper courts' practice of recording in English proceedings

[276] Order XVIII, Rule 9 of the Civil Procedure Code [cap. 33 R.E 2002] requires a judicial officer to direct a court stenographer to record the proceedings in short hand. Nonetheless, because of lack of qualified stenographers to record the proceedings in short hand, in practice the recording of the proceedings is often done by the judicial officers themselves.

[277] Law Reform Commission of Tanzania (n 267)100.

conducted in Kiswahili is non-existent in the Primary Courts. Reasons underlying the predominance of such practice have elsewhere been given. They include the fact that the medium of instruction for legal education in Tanzania is English and the law is drafted in English.[278] Clearly, the Law Reform Commission is in favour of the practice of continuing using English as the language of courts record. Accordingly, the Commission recommended thus:

> *Recommendations*
> *(i) That the language of the Court in the Court of Appeal should continue to be English;*
> *(ii) That the languages of the Courts in the High Court, Court of Resident Magistrate and District Court should continue to be English or Kiswahili as the Judge or Magistrate holding such court shall direct, but the records of proceedings, orders, rulings or judgment must be in English; provided that when hearing appeals from Primary Courts, the language of the Court must be Kiswahili but the record of proceedings, orders, rulings or judgments must be in English.*[279]

Despite the recommendation, the Commission had underscored the observation made by the former Chief Justice of Tanzania, Mohamed Chande Othman who in one of his keynote address identified the use of English in Civil Procedure Code as opposed to Kiswahili as one of the pressing problems.[280] The commission observed that:

> *The catalogue of weaknesses was recapitulated by Chief Justice Mohamed Othman Chande in his keynote address on the occasion of the Annual Conference of the Tanganyika Law Society, 17th February 2012 at Arusha as including, the adversarial process of justice, uneasy co-existence of procedures derived from Common Law, Customary Law and Islamic Law, and use of foreign language (English) which makes it the language of the law instead of Kiswahili the language of the people.*[281]

[278] Wanitzek and Twaib (n. 4) 117.
[279] Law Reform Commission of Tanzania (n 267) 100.
[280] Ibid. See also Othman (n 11).
[281] Ibid 10.

Nevertheless, the Commission in its final report, in the end, recommended that the Language of the Court Rules[282] should be amended. The proposed amendment was couched by the commission in the following manner.

> *Language of the Courts Rules, G.N. No. 307 of 1964*
> *(i) That the Language of the Court in the Court of Appeal must be English;*
> *(ii) That the Languages of the Courts in the High Court, Court of Resident Magistrate and District Court must be English or Kiswahili as the Judge or Magistrate holding such court shall direct, but the records of proceedings, orders, rulings or judgment must be in English; provided that when hearing appeals from Primary Courts, the Language of the Court must be Kiswahili but the record of proceedings, orders, rulings or judgments must be in English.*[283]

While the Commission glorified the continuing use of English as the language of courts record, it is unfortunate that it failed to see the risk and complexity involved in instant translation and recording of proceedings conducted in Kiswahili into English.[284]The practice allows only translated version of the proceedings to be on the record while the original Kiswahili version of the proceedings is not kept anywhere. In addition, there is no requirement on the part of a presiding judicial officer to make a clear record of the fact that the proceedings were conducted in Kiswahili and were instantly and manually translated and recorded by him in English.

Much as the commission recommended the amendment of the Language of the Courts Rules, it did not find it important to recommend the regulation of the practice

---

[282] G.N. No. 307 of 1964.

[283]Law Reform Commission of Tanzania (n 267) 128.

[284]It is worthwhile to note that the report sought to provide for the gaps that exist in civil justice legislation and make recommendations on the ways to fill these gaps. The opinions of the stakeholders, consultants and the Commission were analysed before making recommendations on the best way to improve the civil justice system in Tanzania. The overall aim was to improve the machinery of civil justice in Tanzania by means of reforms in jurisdiction, procedure, regulation of private legal practice and court administration and in particular to reduce delay, cost and complexity.

of instant translation and manual recording of proceedings from Kiswahili to English. More importantly, the commission did not also see the significance of proposing for any improvement in the manner in which proceedings are taken and recorded in courts. There is no doubt that Mwakajinga had the above weaknesses in mind when he maintained thus:

> *While the Magistrates' Courts Act specifies that the record shall be in English in the District and Magistrates' Courts, but in Kiswahili in Primary Courts (section 12(1) (sic)), the law does not specify how court records can be obtained. The present practice is that the magistrate records the protocols in a case file in handwriting. Later these are typed when there is an appeal. At the trial the magistrate has to listen and write simultaneously. The magistrate has to be succinct, reasonably fast and accurate in writing, and be quick in sorting out relevant facts from the evidence. Finally, the magistrate reads the recorded evidence to a witness for corrections.*
>
> *This present method of protocolling is conducive to errors, omissions, or irregularities, which may amount to injustice. The proceedings should be taped-better yet even video-taped- so that in case of an error or omission, the tape will clarify the matter. Video taping has the advantage of showing the demeanor of the witnesses……using such equipment would raise the costs of court proceedings.*[285]

[285]Mwakajinga (19).

Table 4.1: Language of the Courts in Court Proceedings[286]

S/N	Court	Language of Proceedings	Language of court record	Translator of proceedings from Kiswahili to English	Keeping and recording of original Kiswahili account	Interpretation of evidence	Translation of documentary evidence
1.	Court of Appeal	English or Kiswahili	English	Judicial officer/Registrar	Not kept and not recorded in Kiswahili	Court interpreter	Court translator but not legislated for save for probate proceedings
2.	High Court	English or Kiswahili	English	Presiding Judicial officer	Not kept and not recorded in Kiswahili	Court interpreter	Court translator but not legislated for save for probate proceedings
3.	Resident Magistrate Court	English or Kiswahili or "other language"	English	Presiding Judicial officer	Not kept and not recorded in Kiswahili	Court interpreter	Court translator but not legislated for save for probate proceedings
4.	District Court	English or Kiswahili or "other language"	Original jurisdiction (English) Appellate Jurisdiction (Kiswahili)	Presiding Judicial Officer	Not kept and not recorded in Kiswahili	Court interpreter	Court translator but not legislated for save for probate proceedings
5.	Primary Court	Kiswahili	Kiswahili	Not applicable	Kept and recorded in Kiswahili	Court interpreter	Court translator but not legislated for save for probate proceedings

Source: Adopted with modification from Wanitzek and Twaib[287]

[286]Wanitzek and Twaib (n 4) The two authors described the court language in their work in Table2 with the title language of the courts. For the purpose of this study the above table has been slightly modified from what they presented.
[287] Wanitzek and Twaib (n 4)

The following steps illustrate the dynamics of language use in legislative process in Tanzania[288]

Table 4.2: Language Use in Legislative Process in Tanzania

Drafting of Principal Legislation (Bills)	English (with Kiswahili version) Particularly with object and reasons for the bill. Exception: Constitution (Kiswahili)
Drafting of Subsidiary Legislation	Kiswahili or English
Debating of Bills in Parliament	Kiswahili
Public Hearing of Bills	Kiswahili
Enactment of Principal Legislation (Acts, Constitution)	English (Acts, Constitution) Exception: Constitution (Kiswahili)
Publication of Subsidiary Legislation (Government Notices)	Kiswahili or English
Translation of Principal Legislation	From English to Kiswahili: So far there are fifteen laws which have been translated by the Law Reform Commission. From Kiswahili to English: Example: Constitution

Source: Adopted from Wanitzek and Twaib[289]

The Table 4.2 presents an interesting and challenging approach in the processes of legislation in Tanzania.

4.4 Language of Law as a Special Variety of Language Use

The law refers to English language as among the language of the court, but the English used in law and in court is not the plain English language.[290] Rather, it is unique and peculiar legal English which is characterised by legal jargons, Latin and Greek words as well as legal terms peculiar only to law. Indeed, legal English, commonly known as legalese is the language that lawyers and judicial officers have been trained in and exposed to throughout their training process. Since law aims at

[288] Ibid.
[289] Wanitzek and Twaib (n 4).
[290] Both English and Kiswahili as languages of the court consist of legalese. Legalese refers to a jargon characteristically used by lawyers for legal writing which may not be easy for laypersons to understand. It is a special variety of language used by lawyers in courts for purposes of arguments using a specific style employing terms that are peculiar to only lawyers.

precision, legalese is seemingly used to avoid generalisation. It is used in courts by advocates for the purposes of argument and advancement of the interest of their clients. It is also used and reflected not only in court proceedings but also in judgments and other court records. There is no doubt that this language in itself poses a significant barrier to laypersons in their pursuit of accessing justice.

Apparently, even when Kiswahili is used, it also ends up being heavily mixed with such jargons and terms such that a layperson can hardly understand. It is instructive to inquire into the manner in which Kiswahili is used in court proceedings. This would have established the variety of Kiswahili that has emerged over the years as the language of the courts. To be sure, the variety of Kiswahili and in particular vocabularies and a conceptual apparatus used in court would not necessarily be the same as the ordinary Kiswahili spoken by ordinary people.[291] To the above extent, the language used in courts is the "lawyers' or rather "Lawyers Language".

The nature and character of the language of the law is clearly notable in legal writing which is characterised by unusually long sentences with numerous carefully phrased clauses and features that are intended to make it resistant to misinterpretation. It is a distinctive style of writing aimed at a highly specialised group that uses specialised vocabulary imbued with technical meaning.[292] The language of the law used in court rooms as well as during the drafting of legal documents is therefore difficult for the lay person to comprehend unless he gets legal assistance from a person

[291]United Republic of Tanzania, Report of the Presidential Commission of Inquiry into Land Matters, Dar es Salaam, Ministry of Lands, Housing, and Urban Development, Government of United Republic of Tanzania1994, p. 199. See also n 146 whereby a list of some Kiswahili vocabularies commonly used in Primary Court proceedings is given.
[292]Ashipu and Umukoro (n 58).

knowledgeable in law.[293] Certainly, this is inimical to the interest of justice since representation by legal counsel is not free and so many people cannot afford it. This problem is captured by Evans and others when they observed as follow in relation to language of the law:

> *From the clients' point of view, resolving a legal problem without professional help would be extremely difficult. The first problem is the terminology used by lawyers and in the text books, which is both unfamiliar and intimidating to laypersons.* ***The way in which the lawyer communicates with his or her client may create a barrier between them****. It is therefore important for the lawyer to be aware that problem exists and also to be prepared to take steps to overcome it……..It therefore makes sense to avoid the use of legal jargon and to discuss the problem in language the client understands.*[294]

It is not surprising that much concern have been raised against the language of law and language used in the court processes.[295] It is also for this reason, legal writing has often been criticised as an obtuse exercise that encourages the perception that lawyers speak in rhetoric that is without substance.[296] Explaining problem of legal language and the barrier it poses, Ashipu and Umukoro write:

> *The language of law is obscured because of its jargons, ambiguity and inaccuracy. The resultant problem is that those who are not in the legal profession, find it difficult to comprehend such a language variety. Hence, even in a situation where the information that concerns them is vital, it is neglected due to their inability to understand the language. To speak of legal English as communicating meaning is in itself misleading. Of all the varieties of language, it is perhaps the least communicative in that it is designed not to enlighten the users of language at large. According to Maxwell(2013:11), Legal writers pushed into oddity by their attempt to be unambiguous and as it were, in the same direction by the knowledge that since their productions are for the benefit of someone familiar with the jargons as themselves they do not need to bother much about the general public.*[297]

---

[293]Ibid

[294]Evans, J., and Perk, L. (ed) Legal Skills and System, Old Bailey Press, London, 1997, pp.305-306

[295]Different calls and concerns have been made by several human rights activists for the need for courts to use plain English language and the language of the majority of the population

[296]Ashipu and Umukoro (n 58).

[297]Ibid 623.

One can imagine the hardship the accused and litigants go through simply because they do not understand English language. The hardship is worsened by the fact that the legal English as shown above differs from the ordinary language in terms of vocabulary, syntax, semantic and morphology.[298] It comprises of legal jargons derived from colonial legacy constituting other foreign languages. Example the following Latin words used in law: *ab initio* (from the beginning); *ab extra* (from outside); *animus possidendi* (intention to posess); *actus reus* (guilty act); and *obiter dicta* (by the way).

No wonder this situation translates to hardship to unrepresented layperson and to an increased workload to judicial officers entrusted with dispensation of justice and hence delays in disposal of cases. It is in this context that Kwikima, Ag. J. (as he then was) in the case of Simon *Chatanda v. Abdul Kisoma*[299] advised as thus:

> *Where the parties to a suit are laymen conducting their own cases, the trial court should scrutinise the pleadings before admitting them and in general furnish any necessary guidance.*
>
> *In that way people would feel secure to go to court. But not where they will be bombarded with Latin and other jargons they have never heard of and at the end of the day pay for it.* [300]

Consistent with the above authority as per Kwikima Ag J (as he then was), it is according to *Manase Singano and two others v Director of Vicfish Ltd*,[301] the duty of the court to ensure that parties in both civil and criminal proceedings understand the

---

[298]Ibid.
[299]*Chatanda v. Abdul Kisoma* [1973] LRT 11.
[300] The case was also discussed in Peter, C. M., 'The Contribution of the Court of Appeal of Tanzania in the Maintenance and Safeguard of Rule of Law and Human Rights' A Paper Presented in the 25th Anniversary of Tanzania Court of Appeal, Dar es Salaam, 2004, p. 13.
[301]Civil Appeal No. 28 of 1999, High Court, Mwanza (2000) (unreported).

language used in those proceedings. In that case, the appellants contended among other things that the advocate for the respondent always spoke English despite their protesting against it. Mrosso J observed that:

> *I wish to sound a caution that a court has to ensure that all parties in a case are given all available facilities to follow and participate fully in the proceedings. I need hardly remind the trial magistrate that although the district court record must be in English, the proceedings may be in English or Kiswahili as convenient, considering the parties in court. Therefore, the trial court should have directed…..the learned advocate to address it in Kiswahili (if he in fact did not do so) so that the appellants could understand what he was telling the court in his submissions.*

Likewise, in compliance with the procedural rule, the general rule appears to be that where parties to a case are represented, courts demand greater diligence in compliance with the rules of procedure than those parties which are not represented. The court may in those cases, overlook the procedural errors, as was pointed out by Mkwawa J in *Ramadhani Nyoni v M/S Haule & Co.Advocates*:

> *…. I am of the settled view that this Court like any other court worth of the name has the duty to look into the matter sympathetically with a broad mind and most realistic approach. In order to do justice to the case, especially in a case where a layman, unaware of the process of the machinery of justice, tries to get remedy procedural rules should not be used to defeat justice…* [302]

At this juncture, it is pertinent to note that the provisions of law that stipulate for language of law and use in courts do not go as far as imposing a duty to the court to translate pleadings to the litigants. It does not also describe the specificity of the language of law. The omission is perhaps notwithstanding the language fair trial rights that are inherent in article 13 (6) (a) of the said Constitution of United

[302] [1996] TLR 71 at p. 73.

Republic of Tanzania discussed herein below. The only explicit and relevant provision in this context is perhaps section 135(a) (i) and (ii) of the Criminal Procedure Act which forestalls the use of legalese in a charge sheet. However, this provision is only relevant in criminal proceedings. As far as the provision relates to statement of offence, it insists on describing "the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence."[303] In relation to particulars of the offence, the provision states that the same must be "set out in ordinary language, in which the use of technical terms shall not be necessary." This study has not found any similar provision that caters for civil matters.

The dominance in the use of English language in law and courts is not an accident. Rather, it is a retrospective reflection of the British colonial rule which replaced the German colonial rule immediately after the WWI.[304]The British colonial rule lasted for many years from 1922 to 1961.[305] It is responsible for introducing the English common law system in Mainland Tanzania. To facilitate the communication with people, Kiswahili was then used at the level of Native administration and courts. During the process of communication, the chiefs and clerks took the role to interpret.[306] It is from such background that English use in courts traced its origin in Mainland Tanzania.

[303]Criminal Procedure Act [Cap. 20 R.E 2002], s. 135(a) (ii).
[304]It was vide article 22 of the Covenant of the League of Nations that the British took over Tanganyika.
[305] Rashid, N., *British Colonialism in East-Africa During Nineteenth Century*, IOSR Journal Of Humanities And Social Science, 2014, Vol. 19, No. 3, pp. 08-11. See also the Tanganyika Order in Council in 1920,
[306]The British Rule through Tanganyika Order in Council introduced two structures of judicial hierarchies which comprised of the High Court and Subordinate Courts. Customary law was applied when the disputants were natives and on the other hand English law operated. There was also no disruption in areas where traditional system of the courts existed.

4.5 Legal Aspects of Language Use and Language Fair Trial Rights in Court Proceedings

Aspects of language use and language fair trial rights in court trace their basis in article 13 of the Constitution of the United Republic of Tanzania and in particular sub-article 13 (6)(a) of the said Constitution. The scope of the relevant provision reads in full as follow:

> *All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.*
> *(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.*
> *(3) The civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.*
> *(4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.*
> *(5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society.*
> *(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*
> *(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;*
> *(b) no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence;*
> *(c) no person shall be punished for any act which at the time of its commission was not an offence under the law, and also no penalty shall be imposed which is heavier than the penalty in force at the time the offence was committed;*
> *(d) for the purposes of preserving the right or equality of human*

> *beings, human dignity shall be protected in all activities pertaining to criminal investigations and process, and in any other matters for which a person is restrained, or in the execution of a sentence; and*
> *(e) no person shall be subjected to torture or inhuman or degrading punishment or treatment.*

The significance of the above article is that it guarantees right to a fair hearing/trial to any person whose rights and duties are being determined by the court. This right necessarily envisages language fair trial rights since the determination of the rights and duties of such a person involves a hearing; and hence language use and as communication in the administration of justice.[307]Arguably, language fair trial rights are priority rights situated within the minimum guarantees of trial fairness hence clarifying the position of language rights in court proceedings. It is arguable therefore that in so far as the language fair trial rights are concerned, the court has an obligation to fully respect these rights in the process of ensuring justice.[308] This duty is both negative, requiring the court to refrain from violation of fair trial rights, and positive, requiring the court to ensure the realisation of those rights.[309]Language is therefore a pertinent subject for consideration in the reform discourse of civil and criminal justice system of any jurisdiction such as Mainland Tanzania. A commitment to guarantee trial fairness in court proceedings should entail commitment to address the language question.

For any fair trial, among other features, the language used needs to be well understood by all litigants appearing before the court. If the language used is

[307] Namakula (n 4) 4.
[308]Ibid.
[309]Ibid. See also *Abdallah Mponzi v Daudi Mlwilo* Civil Revision No. 1 of 1999, Court of Appeal of Tanzania at Mbeya where the court said "…the fact that a litigant is a layman and therefore likely not to be conversant with technical legal issues before the court has never been regarded by the court as constituting a warrant for depriving the litigant his right to be heard. The right is so fundamental that deprivation of it makes the proceedings concerned incurably defective."

understood only by one party and not understood by another party in the court trial, this leads to inequality before the court due to miscomprehension of language and thus the trial held will be unfair trial and unconstitutional. As stipulated under the cardinal principle of justice embodied in the Latin maxim: *"Audi Altera* Parte, *Audiatur Et Altera"* meaning that "no man should be condemned unheard or without having an opportunity of being heard.

Similarly, "*Qui Aliquid Statuerit Parte Inaudita Altera, Aequum Licet Dixerit, Haud Aequum Fecerit",* means that "He who shall decide anything without the other side having been heard," although he may have said what is right, will not have done what is right." [310]As stated in the case of *Alex John v R.*,[311] the state has enacted many laws containing provisions giving effect to this clear dictate of the Constitution. One such law is the Criminal Procedure Act [Cap. 20 R.E. 2002]. The Act contains many provisions which guarantee a full hearing or a fair trial to an accused person.

There is absolutely no doubt that language plays an important role for any court trial. A fair trial is a central pillar and a cardinal requirement of the rule of law in any justice system. It requires absence of abuse of process, inefficacious proceedings and in absence of bringing administration of justice into disrepute. As a fundamental legal principle in any civil or criminal trial, there is a need to have clear and unambiguous language before the court.[312]

---

[310] The above principle was adopted in the case of *The Attorney General v. Lesinoi Ndeinai and Joseph Saleyo Laizer and Two Others* Court of Appeal of Tanzania at Arusha (Nyalali, C.J., Mwakasendo and Kisanga, JJ.A) Criminal Appeal 52 and 53 of 1979.

[311]Criminal Appeal No. 129 of 2006.

[312] Wanitzek and Twaib (n 4), Namakula (n 4), Mwakajinga (n 19) 230, 232, and 233.

4.5.1 Institution of Cases and the Attendant Language Requirements

Commencement of court proceedings in the courts other than the Primary Courts is by documents. Such documents must be prepared in English language and must be in a prescribed format.[313]In Primary Courts, there are simplified forms which have already been prepared in respect to filing of cases whereby the language used is Kiswahili. As such for anyone who institutes a case will find a readymade form for him/her to fill in, this reduces the tension and costs of hiring a lawyer to prepare documents.[314]

In courts other than Primary Courts, such documents in civil cases include pleadings (a plaint which is replied by defendant by a written statement of defence) and chamber summons supported by affidavit whereas in criminal case the most common document is a charge sheet/information.[315] All these documents are normally served to the other party in the case. As for criminal cases, the charge sheet/information must be availed to the accused person or his/her advocate. Since such documents are prepared in English, the assumption is that one who prepares them must be proficient in the language of the court record. If that is not the case the document might in the process found to be incurably defective. One of very common phenomena is that of having defects in such documents which are attributed by language barrier.[316]

---

[313]*Shariff Ahmed Salim v Kullaten Abdallah Khamis*, Zanzibar Civil Application No.3 of 2006. In this case, the Court of Appeal condoned documents which were drafted in Kiswahili because the parties had no legal representation and were laypersons. The court stated that "….Normally such documents should be in English but since the parties are laymen and were unassisted by counsel, I am not making it an issue…."

[314]The court clerks often provide necessary assistance as to how the form is required to be filled especially for those who have a challenge in reading and writing.

[315]Section 22 and Order IV Rule 1 (1) of the Civil Procedure Code [Cap. 33 R.E. 2002] provides for institution of suit.

[316]See *Hassan Kingama v Republic* [2000] TLR 200, 203-204. In this case, the appellant was also denied the right to be defended by an advocate. The denial of his right to be defended by an advocate also amounted to subjecting him to language barrier as a layperson unrepresented in the case.

A charge sheet can simply be defined as a base of litigation on which the prosecution case stands and the defence case lashes out. A charge-sheet is referred to as a formal accusation that a person has committed a crime.[317] It must therefore be drawn in a clear language that is not only understood by the accused person but also that precisely depicts the circumstances under which the offence was committed.[318] The charge sheet must not only be drawn in clear language, but also read in the accused person's own language or language that he can speak and understand. In this regard, the provisions of section 132 and 135 of the Criminal Procedure Act are noteworthy. Section 132 which provides guideline as to the contents of the charge sheet or information reads as follow.

> *s.132 Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged.*

Equally, section 135 of the Criminal Procedure Act which is also discussed hereinafter is relevant as to the language that needs to be used in the charge sheet or information. The section reads as follows.

> *s.135 The following provisions of this section shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–*
>
> *(a) (i)……..*
>
> *(ii)the statement of offence shall* ***describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms*** *and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;*

[317]In Tanzania, normally a charge sheet is prepared in police stations or State Attorney Chambers to commence criminal proceedings against the accused persons.

[318]*Adan v Republic* [1973] EA 445 at p. 446. Criminal Procedure Act [Cap. 20 RE 2002] s. 132 and 135.

> *(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the* ***use of technical terms*** *shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;*

Consistent with the foregoing, the court in the case of *Adan v Republic* stated that:

> *"when a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.*[319]

Drafting of a charge sheet is a significant step in criminal proceedings since it separates the inquiry stage from trial and the nature of allegation brought against the accused so as to give him an opportunity to defend himself according to the law and thus upholding due-process of law.[320]As shown earlier, charge sheet must be prepared in ordinary language avoiding as far as possible the use of technical terms. As to the importance of narrating clearly the particulars of the offence to enable the accused person understand the case he is going to face, the Court of Appeal said the following in *Isidori Patrice v Republic*[321]:

---

[319]Ibid.
[320] Criminal Procedure Act [Cap. 20 R.E 2002], s. 131.
[321] Criminal Appeal No. 224 of 2007 (unreported).

> *"It is now trite law that the particulars of the charge sheet disclose the essential elements or ingredients of the offence. The requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly the particulars in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

When the accused is arraigned in court the facts constituting the offence must also be read over and explained to him in a language that he understands. All such requirements boil down to avoidance of language and communication barrier in communicating the charge to the accused which could deny him opportunity to defend himself.[322] Such requirements are also available in preliminary stages of investigation and arrest. In this respect, it is a requirement of the law that the accused person must be informed in language he understands the grounds of his arrest and substance of the offence for which he is arrested.[323] On the other hand, the plaint and written statement of defence are the basic pleadings used in Resident Magistrates' and District Courts and the High Court in so far as a civil suit is concerned. Written statement of defence is a document that is filed by a defendant in a civil suit in answer to the plaint. As is for drawing of these documents all processes that follow thereafter require language use from drawing and recording of issues of the suit up to the conducting of the trial which entails witnesses giving evidence.

The implication of the foregoing is that if one does not have legal knowledge and does not understand the language of the court no doubt that it will be extremely difficult if not impossible for one to prepare the relevant legal document or

[322] Criminal Procedure Act [cap. 20 R.E 2002], s. 135.
[323]Criminal Procedure Act [cap. 20 R.E 2002], s. 21.

understand the one that was served to him. He might only do so if he or she hires a counsel to assist him to overcome the obvious barrier towards seeking justice.

4.5.2 Language Aspects of Right to Give Adequate Notice

Notice is critical to the integrity of any legal proceedings. It is a vital principle of fairness and due process in a legal procedure which is provided to both parties, to all those affected by a lawsuit or legal proceeding. Basically, notice deals with information that a party knows or should have known. Generally, it is a legal concept which describes a requirement of a party to have knowledge of legal process affecting his rights and obligations.[324] It underlines a fundamental principle of fair hearing that a party must know the nature of the case against him. The principle applies to both civil and criminal justice.

Consequently, in so far as a civil case is concerned, the plaintiff has to state his case against a party by clearly stating all facts constituting the cause of action. As to criminal justice, a charge sheet must clearly set out the offence with which the accused person stands charged. In other words, the charge must clearly and unambiguously bring to his attention the nature of the charge in clear and unambiguous manner.[325]It would follow that the court must therefore give the opponent a reasonable notice of the case filed against him so that he may adequately prepare a defence.[326] Similarly, a demand notice is a document or letter of legal

[324] Namakula (n 4) 36 and 37.
[325] *Jaston Masengula v Republic* [1977] LRT 32.
[326] Section 100, part V of the Criminal Procedure Act [Cap 20 R.E. 2002] on institution of proceedings states as;
100 (1) Every summons issued by a court under this Act shall be in writing, in duplicate, signed and sealed by the presiding officer of the court or by such other officer as the High Court may, from time to time, by rules direct.

sanctity prepared by a claimant or prospective plaintiff or an advocate on behalf of the plaintiff to be addressed to the prospective defendant. It is a letter of authority which tries to initiate mitigation or civil action resolution prior to the institution of suit in the competent courts of law or tribunal. [327]

The language written in such notice needs to be clear to the person addressed in order for him or her to understand. Otherwise it will be difficult for him or her to respond as required by the court. Interestingly, these notices are by and large issued in English which is the language of court record. The exception is the Primary Court whose notices are in Kiswahili as the latter is the language of record in the Primary Courts. In such circumstances, the defendant will normally find an advocate to translate the meaning and the procedural requirements attached to the notice.

4.5.3 Ascertaining Language Use in Preliminary Hearing

Language is the core foundation for justice. It is the means through which the rights of accused persons and litigants are secured and exercised. It is significant that any inherent language barrier that is likely to affect court proceedings and fair trial must be established beforehand. Once any language barrier is ascertained in advance, proper arrangements can be made to address it. Determination of language use prior

---

(2) Every summons shall be directed to the person summoned and shall require him to appear at a time and place to be appointed in the summons before a court having jurisdiction to inquire into or try the offence alleged to have been committed and shall state shortly the offence with which the person against whom it is issued is charged.

102 (1) Every summons shall be served by a police officer or by an officer of the court issuing it or other public servant or such other person as the court may direct and shall, if practicable, be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons.

(2) Every person on whom a summons is so served shall, if so required by the serving officer, a sign receipt for it on the back of other duplicate. See Civil Procedure Code Act [Cap. 33 R. E 2002], s. 22. and Order IV and Order V as regards institution of civil proceedings in courts other than the Primary Courts.

[327] See <http://www.academia.edu/14458913/Demand_Notice_and_Notice_of_Intention_to_Sue (Accessed 12/4/2017).

to a trial seems to be envisaged under the provisions that cater for preliminary hearing and pre-trial conference in criminal and civil proceedings.[328]A critical reading of section 192 of the Criminal Procedure Act and Order VIIIA and VIIIB of the Civil Procedure Code Act shows that the question as to whether or not there are potential language use barrier in the subsequent conduct of a relevant case has to be ascertained during such preliminary hearing and pre-trial conferences.

In the case of *Ntobangi Kyela and Ngisa Mahila v Republic* one of the issues was whether the accused persons were addressed as to the language, which they were conversant with. When dealing with the issue, the High Court emphasised on the requirement of an accused person to raise any issue as to language barrier at the preliminary hearing and the same to be put on the record.[329] In this case, the court held that if at all the accused persons had a problem with Kiswahili language they would have raised the issue right from the beginning when the matter was for committal and also preliminary hearing. The learned judge was also satisfied that since such issue was not raised by the accused persons at the committal and preliminary hearing, there was no doubt that the accused persons did not have any communication problem with the use of Kiswahili.

Unfortunately, the practice is different as issues relating to language use and language barrier that would for instance call for translation of documents and engagement of court interpreters are never ascertained during such preliminary hearing and pre-trial conferences. Apparently, effective holding of the preliminary

[328] Criminal Procedure Act [cap. 20 R.E 2002], s. 192 and Civil Procedure Code [Cap. 33 R.E 2002], Order VIIIA and Order VIIIB.
[329]*Ntobangi Kyela and Ngisa Mahila v Republic* Criminal Sessions Case No. 81 of 2015, High Court, Shinyanga, (unreported).

hearing and pre-trial conferences presupposes an understanding of the language of the court by the accused persons or litigants. As such, if any of such accused or litigant does not understand the language of the court, a court interpreter must be provided to interpret what ever transpires in the preliminary hearing and pre-trial conference.

4.5.4 Language Aspects of Taking and Recording of Evidence

In any court trial, evidence is substantial for one to prove his case. One cannot give solid ground without evidence. A strong argument is considered with sufficient evidence to prove the case. Therefore, evidence is paramount in all cases before the court of law. Again, in this matter it is paramount for language to be considered in the production of evidence as language is a communication means through which the evidence is given. Whatever evidence produced, it needs to be understood by not only the parties in court but also the court so that they can present well their case in court and the court can at the end of the day determine the case based on the evidence on the record.

It goes without saying that the giving of evidence involves giving an accused person or a litigant a chance to call his witness to testify and if need be produce documents. The giving of such evidence is only possible if a witness understands the language of the court or is facilitated with a court interpreter who would interpret his evidence from the language he is using to give his evidence to Kiswahili or English.[330] It is settled law that refusal to give a party chance to call his witness to testify amounts to

[330] As regards to witnesses with speech and/or hearing impairment, section 128(1) of the Evidence Act [Cap.6 R.E 2002] provides the manner in which the evidence of such dumb witnesses can be adduced. The provision reads: "A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written, and the signs made, in open court."

a refusal to a right to be heard.[331] There is no doubt that failure of a party or his witness to give evidence simply because of language barrier is tantamount to denying him his right to be heard and in particular denying him his language fair trial rights.[332] The same position would apply if a party is denied opportunity to cross-examine a witness of his opponent because of language barrier as afore stated.

In so far as criminal proceedings are concerned, the law clearly provides guidance as to how the evidence given must be taken and recorded by the Resident Magistrates' Courts and District Courts. The law goes as far as providing guidance as to the language to be used and the style of taking and recording the evidence. As far as Resident Magistrates' Courts and District Courts are concerned, the relevant provision reads thus:

> *210.-(1) In trials, other than trials under section 213, by or before, a magistrate, the evidence of the witnesses shall be recorded in the recording in the following manner*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by him and shall form part of the record;*
>
> *(b) the evidence shall not ordinarily be taken down in the form of question and answer, but subject to subsection (2), in the form of a narrative.*
>
> *(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.*
>
> *(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.*[333]

---

[331] *Andrea Salimo v Ernest Msanjila*, Civil Appeal No. 1 of 2007, High Court, Dodoma (unreported).

[332] This is also the case if such a party or his witness does not speak any of the languages (English or Kiswahili) of the court and interpretation facilities are not provided. This is so if it was clear at the trial that the party or his witness was ignorant of the said languages.

[333] Criminal Procedure Act [Cap. 20 R.E 2002], s. 210.

On the contrary, the relevant provision for the Primary Court with regard to the requirement of reading over the evidence to accused, complainant and witness reads as follow:

> *Rule 35 (6) the magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and after each of them has given evidence shall read his evidence over to him and record any amendment or corrections. The magistrate shall certify at the foot of such evidence, that he has complied with this requirement.*[334]

Going by the provision of section 210 of the Criminal Procedure Act, it is clear that the evidence given in Resident Magistrates' Courts and District Courts must be taken and recorded in writing in narrative form in the language of the court. It must also be signed by the presiding judicial officer so that it forms part of the record of the court. As the evidence taken forms part of the record of the court, it is pertinent that the language in which the evidence is taken and recorded must be the language of court record which is presently English. A witness is entitled to have his evidence read over to him if upon being informed of this right by the court he asks the court to read his evidence.[335]

When his evidence is read over to him, he may comment on his recorded evidence. The comments given by the witness must be recorded by the presiding judicial officer.[336] One can deduce from the above provisions that the Primary Court magistrate is obliged to read over the evidence recorded to the witness whereas the resident or district magistrate is only obliged to inform the witness of his right to have the evidence read over to him. In any case, the provisions are excellent

[334]Primary Courts Criminal Procedure Code [Cap. 11 R.E 2002], rule 35(6).
[335]See Criminal Procedure Act [Cap. 20 R.E 2002], s. 210 (3).
[336]Ibid.

safeguard seeking to ensure that the translation and recording of the evidence in English or Kiswahili in the Primary Court did not lead to loss of evidence and distortion of witness testimonies.

In practice, however, witnesses are rarely informed of this right. Indeed, the study did not come across any proceedings which have a record suggesting that witnesses were informed of their right to have their evidence read over to them other than simple statement that the relevant provision was complied with. Of significance is the insistence on the taking of the evidence in the language of the court, and the presence and hearing of the presiding judicial officer even when he directs the evidence to be taken under his direction or superintendent.[337] Despite the niceties of the provision, it does not provide guidance as to instant translation and recording of evidence given in court proceedings in Kiswahili.[338] The provision also caters only for criminal proceedings.[339] It is interesting to note that there is no similar provision applicable to the High Court as to recording of evidence adduced by a witness and reading the evidence over to the witness.

In order for a witness to give a proper testimony, he has to do so through the language known to him or her. It means that if he does not understand the language of the court, there must be a facility such as an interpreter to cater for the need. One of the basic tenets of due process or a fair trial is that evidence in a criminal trial ought to be tendered in the presence and hearing of an accused person unless the

[337]Criminal Procedure Act [Cap. 11 R.E 2002], s. 210.
[338]Ibid.
[339]The study did not find any similar provision in any other legislation that is applicable in civil proceedings.

latter for any reason, decides to absent himself.[340] However, this requirement is not fulfilled by the mere physical presence of the accused in the court room. This presence must be accompanied by his actual full participation in the proceedings. Thus, this right would be illusive if the proceedings are conducted in a language not fully understood by the accused.

4.5.5 Duty to Give Reasons for a Decision

The court has a duty to furnish reasons for any decision it gives. This duty translates to the right on the part of litigants to be furnished with reasons for the decision given. The underlying philosophy is that where the determination of the rights or duties of a party are at issue, a decision maker must give reason. Whatever reasons given, the language used to communicate the decision plays a very important role. Since one cannot reason without language, the language used in reasoning of facts needs to be understood by all parties for the decision is given for them and not for the court.

The manner in which the decision and reasons thereof is communicated to the parties may determine whether or not an appeal or any other action may be preferred against the decision. Since a decision (and reasons thereof) constitutes court record, the decision and the reason thereof must be written in the language of the court which is English.[341]A judgment in criminal proceedings for example contains points for determination, decision and reasons for the decision.[342]Also in the case of

[340] Criminal Procedure Act [Cap. 20 R.E 2002], s. 196.
[341] Criminal Procedure Act [Cap. 20 R.E. 2002], s. 312; The Language of the Court Rules, GN No. 307 of 1964 as amended; The Language of the Court Rules, GN No. 115 of 1981; rule 5 of the Tanzania Court of Appeal Rules 2009.
[342]Criminal Procedure Act [Cap. 20 R.E 2002], s. 312 (1).

conviction, the judgment must specify the offence under the law in which the accused person is convicted and the punishment which he is sentenced.[343] Similarly, in the case of acquittal the judgment shall state the offence of which the accused person is acquitted.[344]

However, on the application of the accused person a copy of the judgment or, when he so desires, a translation in his own language, if practicable, must be given to him without delay and free of cost. Even though the law states the translation of the judgment may be provided as desired by the accused person, the words 'if practicable' puts a condition and uncertainty as to the provision of a translated version of the judgment to the accused.

4.6 Language Use and Interpretation in Court Proceedings

The law envisages language barrier in court proceedings. It is in such regard that provisions were enacted that seek to address the problem. The problem might arise from a party's or his witness's ignorance or limited understanding of language used in court proceedings or language in which the evidence is given. This could arise when a party or his witness does not understand the language of the court or the language in which the evidence is given in court proceedings. It may also occur when a party or his witness cannot give evidence in the language of the court but in the language that he understands. Such a party cannot cross-examine his opponent or his opponent's witnesses by using the language of the court but the language he understands. In the context of Mainland Tanzania, such a party or his witness might be ignorant of or having limited understanding of the language used in the court

[343] Ibid, s. 312 (2).
[344] Ibid, s. 312 (3).

proceedings, which is Kiswahili or English or both. The obvious implication is that the failure to cross-examine a witness on an important piece of evidence as a general rule renders such evidence to be taken as the truth.

In a bid to resolve the problem of language barrier once it arises in the proceedings, the law has in place provisions that cater for interpretation of the evidence given in the language not understood by the accused. One of such provisions is found in section 30 of the Magistrates' Courts' Act which stipulates that:[345]

> *30 (1) Where any evidence is given in a language not understood by the accused, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) Before entering upon the duties of his office, an interpreter shall take oath or be affirmed, as the case may be in the prescribed form:*
>
> *Provided that a regular court interpreter who has taken oath or has been affirmed generally shall not require to take oath or be affirmed in each proceeding.*

The other relevant provision is found under section 211 of the Criminal Procedure Act[346] states that:

> *(l) Whenever, any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) If he is represented by an advocate and the evidence is given in a language other than the language of the court, and not understood by the advocate, it shall be interpreted to such advocate in the language of the court.*
>
> *(3) When documents are produced for the purpose of formal proof it shall be in the discretion of the court to interpret as much of them as appears necessary.*

---

[345] [Cap. 11 R.E. 2002]. See also section 4(b) of the Oaths (Judicial Proceedings), and Statutory Declarations Act [Cap.34 R.E 2002] which provides for the requirement for an interpreter to take an oath.

[346] Ibid.

In Primary Courts, the provision of rule 30 of the Criminal Procedure Code is applicable for interpretation of evidence. The provision reads as follow.

> *30.-(1) where any evidence is given in a language not understood by the accused, it shall be interpreted to him in open court in a language understood by him.*
>
> *(2) Before entering upon the duties of his office, an interpreter shall take oath or be affirmed, as the case may be:*
> *Provided that a regular court interpreter who has taken oath or has been affirmed generally shall not require to take oath or be affirmed in each proceeding.*

The above provisions set a regime for interpretation of evidence in criminal proceedings. Accordingly, when evidence is given in a language not understood by the accused person, the evidence must be interpreted for him in open court in a language understood by him.[347] The evidence must, however, be given in the presence of the accused or his advocate where applicable. The evidence will also be interpreted to the accused's advocate if it is given in a language other than the language of the court. The interpreter must take oath or be affirmed before he discharges his responsibilities. However, if he is a regular court interpreter, there is no requirement for him to take an oath or being affirmed. The requirement as to the court interpreter taking oath or being affirmed is complemented by section 4(b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act [Cap. 34 R.E 2002]. The provision reads:

> *Subject to any provision to the contrary contained in any law, an oath shall be made by-*
> *(a)……..*
> *(b) any person acting as interpreter of questions put and evidences given by a person being examined by or giving evidence before a court*

[347]It would appear that this is also applicable where a witness with speech and/or hearing impairment gives evidence in accordance with section 128(1) of the Evidence Act [Cap. 6 R.E 2002]. As the evidence may in this respect be given by sign language, an interpreter would necessarily be needed.

Notably, Part I of the First Schedule and Part I of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967, have provided a format of an oath to be made by an interpreter in the courts other than the Primary Courts in the following words:

> *I swear that I shall well and truly interpret and make explanation to the court and witnesses and others in the languages of ……. and ……..of all such matters and things as shall be required of me, [as interpreter appointed to the court of .....] to the best of my skill and undertaking.*[348]

As shown earlier, there are similar provisions for interpretation in Primary Court proceedings.[349]According to Part II of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967 an interpreter in the Primary Court must repeat the following:

> *"Mimi nathibitisha kwa kiapo kwamba nitatafsiri katika lugha ya ..... na ..... kwa ukweli na usahihi kwa kadri niwezavyo na nitatoa maelezo yanayohitajiwa kwa mahakama hii, kwa watu wadaawa na kwa mashahidi.".*

One can clearly see the emphasis placed by the law for an interpreter to take an oath or affirmation before discharging his responsibilities in court. It is pertinent that the purpose of such an oath is to give assurance to the witness whose evidence is being

---

[348] However, pursuant to paragraph 2 of Part I of the Second Schedule to the Oaths and Affirmations Rules, G.N. Nos. 125 and 132 of 1967 'any other interpreter shall make oath or affirmation in accordance with paragraph 1, except that he shall omit the words "as interpreter appointed to the court of....."'. It appears that the omission of the said phrase is applicable to interpreter appointed to discharge interpretation duties although he is not a regular court interpreter appointed as such. This implies that the courts must have regular and duly appointed interpreters that can be called upon to discharge such duties as may be necessary. Nevertheless, in practice the courts do not maintain a register of regular and duly appointed court interpreters.

[349]Rule 6 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules [Cap. 11 R.E. 2002] provide for interpretation where a party to a civil matter is not conversant with the language in which proceedings are being conducted. The proceedings have to be interpreted to him in open court in a language understood by him. What such party says must also be interpreted. The same is the case where the evidence is given in a language other than the language in which the proceedings are being conducted. The rules require an interpreter to be affirmed save where he is a regular interpreter who in such situation will need not to be affirmed in each proceeding. As for criminal proceedings see rule 30 of the Primary Court Criminal Procedure Code [Cap.11 R.E. 2002] which enacts similar provisions as the foregoing.

interpreted to the court that the interpretation is faithful and not misleading. The obvious question is on the legal effect of the omission by the court to require an interpreter to take the interpreter's oath or affirmation.[350] This question is dealt within chapter five of this study.

Apart from the fact that Kiswahili is used in the Primary Courts and the affirmations/oaths for interpreters are made in Kiswahili, the other difference is that the regime for primary court interpreters covers both civil and criminal proceedings. This is particularly so because the provisions of section 211 of the Criminal Procedure Act and section 30 of the Magistrates Courts Act are only applicable in criminal proceedings in Resident Magistrates' Courts and District Courts. The study did not find a corresponding provision that applies in civil proceedings in such courts. The exception could be in probate and administration matters, in which there is the Probate and Administration Rules [Cap.352 R.E 2002] that governs translation of a document which ought to be filed with an application. The relevant rule reads as follow:

> *Where any document required under these Rules to be filed with an application or otherwise produced to the court is in any language other than English there shall be attached to such document a translation thereof in English made by a person competent to translate the same and verified by such person by affidavit in the form prescribed in Form 2 the First Schedule.*[351]

[350] See for instance *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company* Civil Appeal No. 95 of 2001, Court of Appeal, Dar es Salaam (unreported).

[351] The first exception is reflected in rule 8 of the Probate and Administration Rules [Cap 352. R.E. 2002]. The case of *Re Aloysius Benedicto Rutaihwa* Probate and Administration Cause No. 1 of 2013, High Court, Bukoba (unreported) is worth noting. In this case, a will written in English and *Kihaya* was used in evidence although it was admittedly translated by undisclosed person without following the requirement of rule 8 of Probate and Administration Rules [Cap. 352 R.E 2002]. The court did not seem to have addressed itself to the said rule. Had it done so, perhaps it would have rejected the translation. No doubt that the admission of the said will along with its translation occasioned failure of justice to those who were objecting the will. The other exception could be section 4 (b) of the Oaths (Judicial Proceedings) and Statutory Declarations Act which in practice seems to be applied in all courts in both civil and criminal proceedings.

However, the above provision governs translation of document, which is in any language other than English which is the language of court record. It is strange that Kiswahili is omitted while it is as earlier shown language of the court and widely understood by people in Tanzania. Unlike the other provisions on interpretation and interpreters, rule 8 of the Probate and Administration Rules provides an indication as to the qualification of the translator which includes his experience in translating documents from the original language into English. According to such rule such translator must have competence to translate the document into English from another language. Having translated the document, the translator must verify by an affidavit that the translation is true and faithful. The format of the affidavit to be sworn or affirmed is prescribed in Form 2 in the First Schedule to the Probate and Administration Act [Cap. 352 R.E 2002]. The form is to the following effect.

"FORM 2
AFFIDAVIT VERIFYING TRANSLATION OF A DOCUMENT
(Rule 8)
(Title)

I, C.D. of .....
make oath and say as follows–
1. That I am well acquainted with (Kiswahili) and English languages and have had experience in translation of documents from (Kiswahili) into English (state qualifications, if any)……..
2. That the paper writing marked "A" is a true and faithful translation of .....(descriptions of the document translated) marked B which is in (Kiswahili) language.
Sworn, etc."

It is pertinent to note that the translator is required to state his qualification relevant to translation involving English and the other language in which the document was written. This is glaringly wanting in the other provisions that cater for interpretation of evidence given in language not understood by the accused. This is particularly so

as there is no stand-alone legislation that regulates the conducts of interpreters and translators.[352]

As to translation of a document, section 173(3) of the Evidence Act is relevant.[353] It enables the court to cause a document to be translated by a translator. In so doing, the court may direct the translator to keep the contents secret until such time when the document is given in evidence. If the translator disobeys such direction he will be held to have committed an offence under section 96 of the Penal Code [Cap. 16 R.E 2002] in relation to abuse of office whether or not he holds office in the public service. As a whole the law relating to translation and interpretation is not elaborate. Among other things, and in addition to the weaknesses pointed out above, it does not provide the types of interpretation required for the interpretation service in court. The law does not indicate whether the interpretation ought to be consecutive or simultaneous or perhaps both. The law does not explain how many interpreters are required in particular sessions and their tenure of service whether they are employed by the courts or are freelance interpreters. In this regard, the law does not state if there is specific guideline and any lists of the registered interpreters to provide interpretation service in court.

Nevertheless, the law also does not provide any kind of mechanism for monitoring and evaluation for the quality of interpretation service provided in courts. Most importantly, the law on court interpretation is completely silent as to the requirement

[352]See for example the US Federal Court Interpreter's Act 1978. This Act reflects the parallel efforts on the part of State governments in the US to ensure the due process rights of the non-English speaking and the hearing impaired. With this Act, when such persons are brought into the judicial system, increasingly one finds in the courtroom a person who makes communication between the legal actors possible: the court interpreter.

[353] [Cap. 6 R.E 2002].

of impartiality on the part of court interpreter and the right of a litigant or an accused to refuse the interpreter. There is yet another anomaly. The provisions as to interpretation of evidence given in the language which is not understood by an accused person only relate to the evidence given in the trial which is just a part of the entire court proceedings. Clearly, the relevant provisions do not provide for interpretation of the other part of the proceedings. Therefore, the existing law is not comprehensive. The following figure summarises the process of interpretation and translation of evidence from source language to the target language during court proceedings and the roles played by a court interpreter and a presiding judicial officer in the interpretation process.

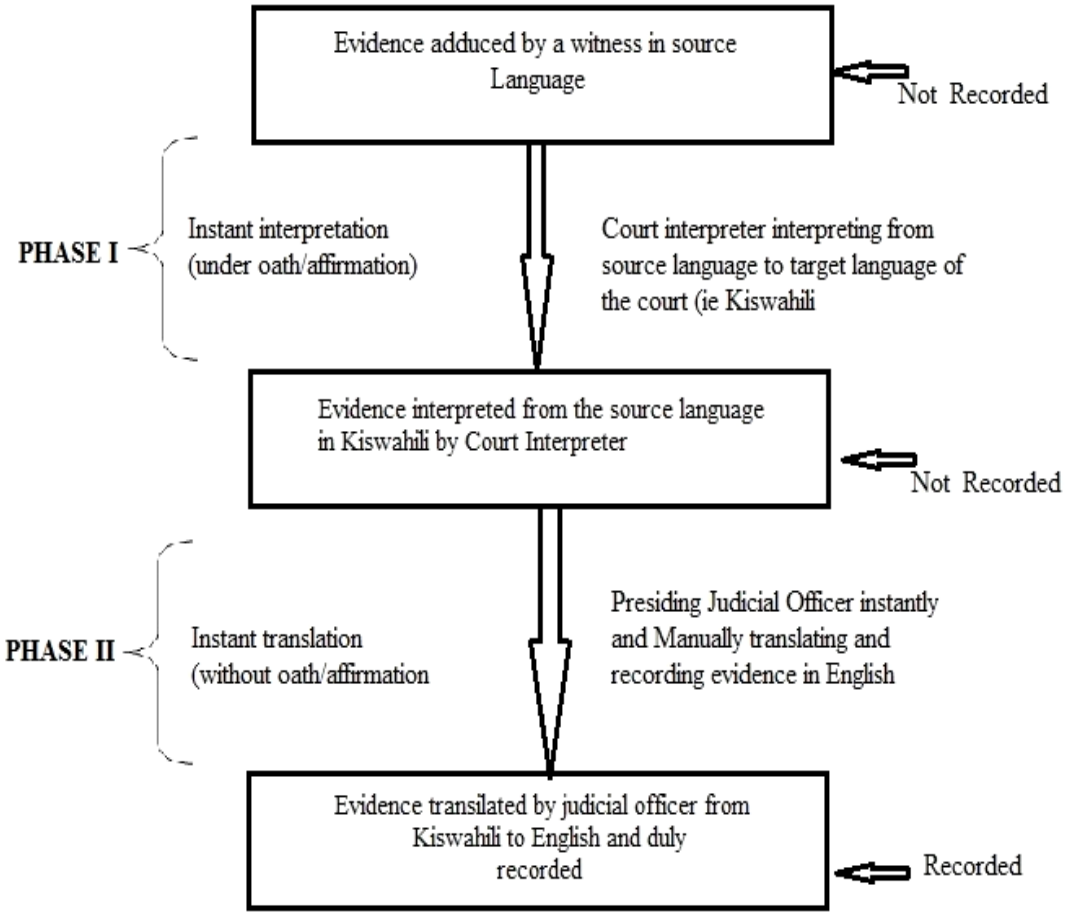

Figure 4.1: Court Interpretation and Translation Paradox in Court Proceedings
Source: Researcher of this study, 2017

4.7 Towards Overcoming Language Barrier in Court: Some Proposed Solutions

Because of the obvious language barrier that looms the language use in Mainland Tanzania courts, there are some proposed solutions that have been suggested to overcome language barrier. Most of the proposed solutions advocate for the use of Kiswahili language as the language of the court record as opposed to English which is not widely spoken and known by all people in Tanzania.

One such suggested solution comes from the report of the Presidential Commission of Inquiry into Land Matters.[354] The commission's report proposed more than two decades ago that Kiswahili should be used as the language of the court and court records. In its very words, the commission argued that "the language of the court-including that of recording proceedings and judgments-at all levels should be Kiswahili. Undoubtedly, the court will continue combining English and Kiswahili to refer to certain concepts."[355] The commission went on to say that "[w]e do not see any formidable obstacles which cannot be overcome through effort and practice in this regard, even if the statutes continue to be in English." The commission advised that "…the process of dispute resolution itself, if conducted in Kiswahili, will organically generate a vocabulary and a conceptual apparatus which in turn will assist the drafting of laws in Kiswahili."[356] This proposal is seemingly based on the theory that advocates for the use of Kiswahili as the language of law and courts.

The above proposal for the use of Kiswahili reflects the theory advocating for Kiswahili as the language of law and the court. Notably, the theory that advocates

[354] Presidential Commission Report on Land Matters (n 291) 199.
[355] Ibid.
[356] Ibid.

for the use of Kiswahili assumes that the use of Kiswahili would overcome language barrier in court proceedings. This theory however, fails to see the significance of language interpretation in court proceedings as a means of overcoming language barrier. Arguably, it is also erroneous to think that language barrier can simply be eliminated by the choice and use of language which is widely spoken in Tanzania.

Equally, the theory ignores the plurality of language that is apparent in Tanzania and the globalisation drive that has facilitated movement and migration of the people across the globe. The use of Kiswahili only as the language of the law, language of the court and court record has also the potential of creating barriers to those who are not conversant with Kiswahili or a particular variety of Kiswahili. Nevertheless, since a large portion of Tanzania population is conversant with Kiswahili, there is no doubt that the use of Kiswahili will necessarily overcome language barrier to a larger extent than the use of English language in court.

As discussed in the main text of this chapter, it would appear that this proposal is not favoured by the Law Reform Commission of Tanzania. The latter of the view that since Tanzania is part and parcel of the commonwealth is not advised to resort to Kiswahili as the language of court record. The Law Reform Commission is also of the view that using Kiswahili would affect negatively advocates' proficiency in English language. Apparently, the Commission's recommendation is in favour of English language. Whilst the Law Reform Commission was making such recommendation, its long established on-going activity project of translating legislation into Kiswahili has almost stopped having started in 2008. The project was

designed to make effective contribution towards improving access to justice and administration and dispensation of justice.[357]

Clearly, the recommendations made by the Law Reform Commission as to the continuing use of English as the language of the court contradicts its original mission of translating the laws into Kiswahili with a view to enhancing access to justice and administration of justice. In some respects, the proposal by the Law Reform Commission corresponds with the theory advocating for the continuing use of English, arguing that the language barrier is inherent in the skills and professionalism of the very legal profession.

There is yet another proposal which advocates for affidavit evidence to be filed along with a plaint when a suit is being instituted and a counter-affidavit to be filed with written statement of defence.[358] This proposal aims to replace if not to reduce the scope of oral evidence. Although the proposal is not entirely designed to overcome language barrier, there is no doubt that its implication if it were adopted and implemented, would have positive results in reducing loss of evidence and distortion of witnesses testimonies. Since the evidence in chief of a witness would be in an affidavit, the scope for oral examination would be restricted to cross-examination and re-examination and hence reduction of the chances for loss and distortion of evidence and testimonies that result from instant translation and

[357]Translation of laws was being undertaken as one way of simplification of law and it was being done in accordance with the functions of the Commission under section 4(2) (iii) of the Law Reform Commission Act [Cap.171 R.E 2002].

[358]As discussed in chapter 5, this proposal has already been adopted in election petitions. In such cases, a witness affidavit is filed in court as evidence in chief of such witness. In a sense, this procedure now applies in the Commercial Court where "witness statements" are used. See the High Court (Commercial Division) Procedure Rules, 2012 (G.N 250 of 2012).

recording and incorrect comprehension of evidence given orally. In relation to this proposal, the Law Reform Commission reported as thus:

> *In order to cut down on the number of days spent to examine in chief of witnesses, it is time to take full advantage of affidavit evidence which accompanies pleadings.*
>
> ***Recommendation:***
> *We recommend that examination-in-chief of witnesses shall be on affidavit that is filed with the pleadings. We further recommend that the trial court shall only take evidence only in cross-examination or re-examination. Trial courts should appropriately allow the admissibility of documents filed along with affidavits.*[359]

Elsewhere within its report, the Law Reform Commission also recommended as follows:

> ***Observation of the Commission:***
> *It is now time to introduce affidavit evidence when a plaintiff files his suit.*
> ***2.2.8.4.1 Recommendation:***
> *(i) We recommend the amendment of section 22 of CPC by adding a new sub section to require that in every plaint, facts shall be proved by affidavit.*
> *(ii) We further recommend the amendment of Order VIII to require that in every written statement of defence, counter claim and set-off, facts shall be proved by affidavit.*[360]

4.8 Conclusion

The language of the law is characterised by legalese which creates barrier to laypersons in accessing courts. The fact that Tanzania is multilingual and the legal framework allows for complicated co-existence of Kiswahili and English as languages of law and court in different contexts, the courts are potentially likely to experience instances of language barrier. It is unfortunate though that nothing very significant has been done to address language barrier other than the presence of an

[359]Law Reform Commission of Tanzania (n 267) 35.
[360]Ibid.

inadequate regime that regulates interpretation of evidence mainly in criminal proceedings. Whilst the instant translation and recording of evidence given in Kiswahili into English is a characteristic feature of the day to day court proceedings, nothing has thus far been devised to address the challenge which has potential for loss and distortion of evidence and witnesses testimonies. Whilst the regime appears to envisage language fair trial rights as priority rights, the concept is seemingly still yet to be realised and prioritised in court proceedings. In any event, the regime as to language use in Tanzania courts, to some extent, borrows from the international legal regime which is also inclined towards criminal justice. The subsequent chapter will endeavour to explore practical instances of language barrier that are inherent in the present legal regime for language use.

CHAPTER FIVE

5.0 INSIGHTS AND IMPLICATIONS OF LANGUAGE BARRIER IN MAINLAND TANZANIAN COURTS

5.1 Introduction

This chapter takes further the issue of language use in the Mainland Tanzanian courts as discussed in the preceding chapter. It focuses on languages in which courts conduct and record their proceedings and write their judgments, and the problem of language barrier that arises in the process. The chapter takes into account the fact that Tanzania is a multilingual society, which makes language issues in court proceedings intricate. Those who do not understand languages designated as official are discriminated against unless they are consistently provided with adequate interpretation facilities. Much has been said and written on the complexity of legal rules and procedure that impede justice access and administration. However, very little has been done and written on the problem of language barrier and the manner in which the problem presents and manifests itself in various court processes, its implications to justice access in courts and the judicial responses to the problem.

The dearth of literature on the area is prevalent notwithstanding the widespread acceptance of the existence of the language barrier and its implication in justice access and administration in Mainland Tanzania courts. No wonder that complaints and concerns are consistently raised not only by laypersons, but also by members of the legal fraternity.[361] The acceptance of the existence of the language barrier as a

[361] See for example Ms Sara Msafiri (Special Seats-CCM) and Moses Machali (Kasulu Urban-NCCR) both arguing that it was illogical to use a foreign language in documenting court while the country had her own internationally recognised language. Available on TBC parliament records and on

problem in accessing justice in Mainland Tanzania courts is hinged on, and cognisant of, the languages used in the court proceedings, which are Kiswahili and English and the dominance of English over the latter as a language of courts record. The exception to the latter is in the Primary Court where the language of the court is Kiswahili.[362] The problem exists notwithstanding the requirement in the law for provision of interpreters for litigants who do not speak and understand English or rather the language used in the court. The truth is the non-English speaking litigants are disadvantaged even when they are provided with interpreters because upon determination of the case they will face yet another round of barrier from the court records which are kept in English.

This chapter therefore attempts to highlight some of the problems brought about by the languages used in the court proceedings in Mainland Tanzania Courts. The chapter is aimed at pointing out the manner in which language barrier manifests and presents itself as a problem in the court proceedings, implications posed by the problem in justice delivery and the responses of presiding judicial officers to the problem. In such endeavour, the chapter among other things engages with court proceedings, judgments and rulings of the courts in various court cases.

5.2 Instances of Language Barrier in Courts other than Primary Courts

It is very common to find instances of language barrier when one looks at decided cases, court proceedings, pleadings and other court related documents. There is no

http://allafrica.com/stories/201211010206.html (Accessed 01/11/2012). Chapter four of this study elaborates in details on the use of English and Kiswahili language in courts in Tanzania. See also comments and recommendations given by Bwana (retired JA) which were broadcast on 2/08/2017 at 01:00 pm East African time in ITV.

[362] Notably, the use of Kiswahili in the Primary Courts tends to breed other complications especially when the Primary Courts proceedings are a subject of appeal or revision in the upper courts which use English as the language of the court record. In district and resident magistrates', courts 'other language' maybe used as the court direct.

doubt that such instances are a true manifestation of the problems of language barrier that characterise Tanzania's legal system and constrain access to justice. In many respects, instances of language barrier are noticeable in their end results. Indeed, each and every instance has notable implications to litigants, accused persons and process of administration of justice in courts. Although courts recognise the significance of language to legal process, the practical effects of the subject is avoided.[363]

5.2.1 Defects in Pleadings, Charges and other Court Documents

As shown in the previous chapter, commencement of court proceedings in the courts other than the Primary Courts are by documents. Such documents must be prepared in English language and must be in a prescribed format. Hence, the assumption is that one who prepares them must be proficient in the language used by the court. It is common place for such documents during the proceedings to be found defective by the court. The defectiveness may be due to various reasons including poor language use. This is because the law requires for example a charge sheet or information to be drawn in a clear language that is understood by the accused person and depicts the circumstances under which the relevant offence was committed.

As to a plaint for example, it must be draft in the manner that clearly disclose the relevant cause of action. In certain instances, the courts tend to characterise the defects as incurable with the consequences that the matter before it might end up

[363]Namakula (n 4) 3. For example, it is common place that the language barrier recurs almost in every court proceedings. There has not been concerted effort at the level of judiciary in addressing the problem; be it in continuing judicial training, enactment of court rules, harmonisation or mainstreaming of various measures employed by individual judicial officers to overcome language barrier and identification of best practice in overcoming language barrier in court proceedings and understanding of instances of language barrier and their implications in justice administration.

being rejected or struck out with costs in civil case. In criminal cases, it is common place for such consequences to lead to an acquittal of an accused person and retrial of the case *de novo*.[364] The main cause is due to language problem faced by the officers who are responsible for writing the charge sheets.

In the case of *Musa Mwaikunde v Republic,*[365] the conviction against the appellant was quashed and sentence imposed against him was set aside. The court was satisfied that the charge sheet was defective as the particulars of the offence were not sufficient. In other words, the manner in which the charge sheet was drafted, it was clear that the prosecutor who drafted it suffered from language barrier. Apparently, the prosecutor could not properly craft statement of particulars of the offence that is consistent with the facts and the ingredients of the offence. The consequence was that the accused person was taken not to have known the nature of the case facing him and hence there was no fair trial. In relation to such failure, the court in this case stated that:

> *It is interesting to note here that in the above charge sheet the particular of statement of offence did not allege anything on threatening which is the catchword in the paragraph.*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind, the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element…..In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him.*

[364]See *Hassan Kingama v Republic* [2000] TLR 200, 203-204. In this case, the appellant was also denied the right to be defended by an advocate. The denial of his right to be defended by an advocate also amounted to subjecting him to language barrier as a layperson unrepresented in the case.

[365]*Musa Mwaikunde v R* [2006] TLR 387. See also *Buhimila Mapembe v Republic* [1988] TLR174; *Munisi Marko Nkya v R* [1989] TLR 59.

Similarly, in the case of *Isodori Patrice v Republic*[366], which was also discussed in chapter four, the court emphasised that it is a mandatory statutory requirement that every charge/ information shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

In addition, in the case of *Mawazo Makiwa v. Republic*[367] which was before Twaib, J,[368] the appellant was appealing against the decision and orders of Kilosa District Court at Kilosa, which convicted him of rape and sentenced him to 30 years imprisonment. After the perusal of the court proceedings and hearing both the appellant and the prosecution side, the appellant was discharged by the court and was ordered to be released from prison because the prosecution failed to state in the particulars of the offence, that; firstly, the accused's carnal knowledge of the girl was unlawful; and secondly, that the girl was below the age of 18 years. Therefore, due to the above two crucial omissions by the prosecution, the court stated that the crucial omissions had been committed by the prosecution and rendered the appellant's plea equivocal and, therefore, his conviction unsustainable. Subsequently, the court discharged the appellant.[369]

Defects signifying language barrier are also notable in other court documents filed in court by or on behalf of litigants or accused person/persons. It occasionally happens

[366]*Isodori Patrice v Republic*, Criminal Appeal No. 224 of 2007 Appeal (unreported).
[367]*Mawazo Makiwa v. Republic*, Criminal Appeal No. 45 of 2013, High Court, Dar es Salaam District Registry.
[368] Twaib., J.
[369] Judgment was delivered at Dar es Salaam on 27th October 2014.

that a quick look at a document makes one to conclude that whoever prepared it has limited understanding and knowledge of English language. It is always obvious in such documents that the drafter was struggling with language barrier and hence difficulties in proper and clear presentation of whatever he wanted to put across. With the recent technological advancement in communication, such instances are always exposed through social media. One of such instances can be drawn from a letter prepared and filed in Kilwa District Court by one advocate. The letter was a subject of debate in many social media. The letter in part reads as thus:

05/02/2013

HON. DISTRICT COURT MAGISTRATE 1/C
KILWA DISTRICT COURT
P.O.BOX……..
KILWA

REF: THE NEED TO JOIN IN CRIMINAL CASE No. 4 of 2012
Reference is made to the above subject.
I am an advocate of the High Court Surbordinate. I am here by pray to join tthe case above to represent accuser an the suit is in the Kilwa District Court, the parties to the case are:

Republic
Verses
AHMADI ALLY RUWAMBO…….Accused

Due to the instructions of my client who is accuser to the suit, therefore trough this letter let the court accept and be aware that the accuser will be presented by Mnahi MNAHI MUHEKA NILUNBA & CO. ADVOCATES in the application against the Respondent.

Yours faithfully
(Sgn and stamped)

The foregoing is a testimony of the fact that the language barrier is also a challenge to some lawyers.

5.2.2 Complaints Relating to Language Barrier During Trial

There have been complaints by litigants and accused persons about language barrier during trial in courts. In some cases such complaints have been raised as grounds of

appeal against a decision of a trial court. The complaints have been mostly with regard to the use of English language in court records in the courts other than the Primary Court. The complaints demonstrate difficulties experienced by those who cannot afford to hire an advocate to represent them in court. The complaints have at times been raised by a party who was also represented by an advocate. This is particularly so when the advocate submit in English in court on a contested point, notwithstanding the presence of their clients. For those who are not knowledgeable in law and in English language, it is a scary situation they navigate in court.

One can compare this situation with those who go to the hospital and only find the doctor who speaks only English and not Kiswahili. In this scenario, one feels double pain hence double jeopardy. Firstly, for suffering the illness, and secondly, for not understanding the language which the doctor is speaking. To address such a situation, the patient needs a third party to interpret so that his or her disease can be diagnosed. It is in such respect that the patient can receive the right treatment. Without such interpretation, it is obvious that the patient will not be able to receive the right treatment which may become disastrous to the patient. Similarly, access to justice and indeed fair and proper administration of justice can only be attained through proper communication before and during trial otherwise justice will not be done or seen to be done.

In *Edward Robert Moringe @ Kadogoo v Republic*[370] the Court of Appeal of Tanzania was asked by Edward Robert Moringe (the applicant) to review its earlier decision which upheld the conviction for murder. The applicant raised a number of

[370] Criminal Application No.9 of 2005, Court of Appeal of Tanzania, Dar es Salaam (unreported).

grounds to support his application for review. One of such grounds related to language barrier that the said applicant went through during the hearing of his appeal in the Court of Appeal proceedings. The proceedings led to his conviction for murder being upheld by the Court of Appeal. Interestingly, the second ground, which was raised also suggested instance of language barrier. It is so because the applicant complained that his advocate at the hearing of the appeal came up with his own grounds of appeal instead of arguing the grounds that he had given to him. The latter is arguably an indication of language barrier and hence miscommunication between the applicant in that case and his advocate whom the Court of Appeal agreed that he had 'limited knowledge of Kiswahili'. In this case, the Court of Appeal recorded the complaints in the following words:

> *In this application the applicant is seeking review for a number of reasons. First, he did not quite follow the proceedings at the appeal stage because the Court used English instead of Swahili language. Second, he had no faith in Mr. Chadha, learned advocate, in that at the hearing of the appeal the advocate came up with his own grounds of appeal instead of arguing the ones he had given to him.*

The court ruled that the ground on language barrier was an afterthought. The court reasoned that the applicant was in court when the appeal was heard and yet he did not object any limitation as to his understanding of English.

An example of the above complaint relating to language barrier is also vivid in the case of *Kashindi Ramadhani @ Moba Pascal v Republic*.[371]In this case, the main complaint that was raised in appeal was that the trial was not a fair one because the appellant was not accorded the services of an interpreter. The basis of the complaint

[371]Criminal Appeal No. 268 of 2008, Court of Appeal of Tanzania, Tabora (unreported).

was that he was not accorded a fair trial because, being a Ruba by tribe, he was not conversant with the proceedings against him which were conducted in Kiswahili language. As was in the other case (*Edward Robert Moringe* case), in this case, the ground was found to be devoid of merit as the appellant had not raised the issue at the trial. The ground was therefore an afterthought.

5.2.3 Failures in Court Interpretation

The law requires that an interpreter should be provided to a person participating in court proceedings who does not understand the language used in the court proceedings.[372] In Tanzania, the language of the court other than the Primary Court is Kiswahili and English, the latter being the language of the record.[373] As the proceedings and evidence are often conducted in Kiswahili and instantly translated and recorded in English, there is always a requirement of getting an interpreter to interpret from Kiswahili to English for the interest of one who understands English or any other language but does not understand Kiswahili.[374] There are instances where interpretation is needed from Kiswahili to a relevant local tribal language and vice versa.

However, there are no registered interpreters from which an interpreter could be drawn and called upon to provide interpretation service.[375] The latter is notwithstanding that the provisions on language interpretation refers to the presence of regular court interpreter. When the court has to comply with such requirement, it

[372]See section 211(1) of the Criminal Procedure Act [Cap. 20 R.E 2002], s. 211(1).
[373]Magistrate Courts Act [Cap. 11 R.E 2002], s. 13.
[374]Ibid, s. 30; Criminal Procedure Act [cap. 20 R.E], s. 211; and Oaths and Statutory Declarations Act [Cap. 34 RE 2002], s. 4.
[375]The law on court interpretation discussed in chapter four makes it clear that there is no requirement for the court to maintain a register of competent court interpreter or translator.

has to struggle to get a person who can make such interpretation. There are therefore instances where proceedings were conducted without an interpreter and instances where interpreter was not consistently provided throughout the proceedings.[376] There are other instances whereby a witness or a complainant served as an interpreter in the same case.[377]

The value and importance of interpretation of legal proceedings to all parties in court are indisputable. Provision of interpreters and interpretation facilities is paramount in administering justice in court for all parties in both civil and criminal cases if they happened not to understand the language used in court. However, lack of interpreters and interpretation facilities are a common feature in Tanzania courts.[378] The failure to provide a qualified interpreter is not uncommon. The absence of such interpreters and interpretation facilities affects the rights of an accused person or a litigant if he does not understand the language of the court. The right of an interpreter also extends to the advocate representing an accused or a litigant if the evidence provided is in another language other than the language used in court. However, the position which seems to be maintained by the courts is that the failure to provide interpretation is not a meritorious ground of appeal unless it is shown that it led to miscarriage of justice and was in fact raised in the trial.

---

[376] See for instance *Moses Mayanja @Msoke v Republic* Criminal Appeal No. 59 of 2009, Court of Appeal of Tanzania (unreported); *Mpemba Mponeja v Republic* Criminal Appeal No. 256 of 2009. Court of Appeal of Tanzania (unreported); *Republic v KulwaD/O Ng'hogela* Criminal Session No. 59 of 2009, High Court of Tanzania, Mwanza (unreported).

[377] See for instance *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company* Civil Appeal No. 95 Of 2001, Court of Appeal, Dar es Salaam (unreported).

[378] The High Court (Commercial Division) is the only court which is equipped with transcribers and also have problem with language which cause the process to be slow and thus it is a challenge in itself.

The absence of interpreter and interpretation facilities is evident in courts when an accused person is charged with an offence in any of such courts. A charge or information which is in English is normally read to the accused in Kiswahili by a court clerk. There is normally no officially written translation of the charge or information from English into Kiswahili. Neither does the court have a court interpreter to interpret the charge sheet or information to the accused person from English into Kiswahili.[379] There is as such no guarantee that the court will interpret the charge or information in a manner that consistently reflects the original charge sheet or information drafted in English. Interestingly, the fact that the charge or information written in English is read over in Kiswahili in court is not reflected in the court proceedings. Similarly, the oral translation read over to the accused person is not recorded in the proceedings.

As is the charge sheet or information, the facts sheet or statement of facts of the case which is prepared in English is also read over to the accused in Kiswahili without any official Kiswahili translation on the record. Unlike the charge sheet or information which is read by the court clerk, the statement of facts or facts sheet is orally translated in Kiswahili and read over to the accused by a prosecutor of the case. Whilst the law requires an interpreter to take an oath or to affirm before making an interpretation, the court clerk and the prosecutor who respectively translate the charge sheet or information and the statement of facts do not take any such oath or affirmation before discharging such duties. The practice is not governed

[379] The court clerk and bench clerks who usually interpret charges/ information to accused persons are not trained interpreters and have never attended any training on court interpretation. In most cases they are not lawyers. They may not understand well the legal concepts and terminologies used in the charge sheet/information.

by any regulation. Arguably, translation of such charge sheet or information and statement of facts ought to be done by a court interpreter pursuant to the provisions of section 30 of the Magistrates' Courts Act, section 211 of the Criminal Procedure Act and section 4(b) of the Oaths (Judicial Proceedings) and Statutory Declaration Act discussed in chapter four of this study. In addition to the translation of charge sheets or information and the statement of facts by the court clerk and prosecutor, presiding judicial officers often times play an active role in offering interpretations during court proceedings.[380]

The absence of interpreter was in this study observed in Bagamoyo District Court. This is when the researcher in this study was privileged to be asked to volunteer to interpret in one of the sessions in the case of *Republic v Tatu Rajabu Msango and Two Others.*[381] Surely, it is not also uncommon for courts to ask any advocate from audience to discharge the duty of interpretation.[382] Issues as to legal implications of such practices abound.[383]As shown in chapter two of this study, court interpreting is a highly specialised skill. It requires language fluency, interpreting skills, familiarity with technical terms and courtroom culture and where relevant knowledge of codes of professional conduct for court interpreters.[384] It is not just a matter of picking any bilingual individual to conduct court interpretation at the court's convenience. Rather, it requires choosing a qualified and an impartial individual who is proved to be capable of discharging such a responsibility that affects people's rights and duties.

[380] This is a daily routine of a presiding judicial officers when discharging his judicial function.
[381] The researcher interpreted the case of *Republic v Tatu Rajabu Msango and Two Others* Criminal Case No. 297 of 2012, the District Court of Bagamoyo.
[382] Ibid. Mwakajinga (n 19).
[383]This may lead to misinterpretation of evidence, distortion of testimonies, and loss of evidence.
[384] Discussed also in chapter two of this study.

Although court interpretation is a professional undertaking that requires one to have relevant qualifications, it is not the practice of the court to put on the record the processes that led to the appointment of a particular court interpreter for a particular case. It is in similar vein that the courts do not record qualifications of the appointed court interpreter in court proceedings. It is also not surprising that litigants, accused persons, or witnesses are not usually heard on whether or not they have any reason to object to the appointment of a particular individual as a court interpreter.

To be sure, when the researcher for this study was invited there and then to serve as a court interpreter for Bagamoyo District Court, neither the prosecution nor the accused persons were heard on whether they had any reason why the researcher should not serve as such. Apparently, the engagement of the researcher as a court interpreter was not preceded by an exercise that would have enabled the court to satisfy itself that the researcher was a qualified and competent person to serve as a court interpreter. The researcher's qualifications for discharging interpretation duties were never determined and recorded in the proceedings.

An examination of cases relating to failure to provide court interpretation and consequences that may result therefrom is important at this point. In the case of *Mpemba Mponeja v Republic*,[385] the appellant was charged and convicted of murder contrary to section 196 of the Penal Code. He was sentenced to the mandatory sentence of death by hanging. He was aggrieved by the conviction and sentence. He therefore appealed against the conviction and sentence raising a number of grounds of appeal.

[385] Criminal Appeal No. 256 of 2009, Court of Appeal of Tanzania, Mwanza (10/09/2012) (unreported).

One of such grounds of appeal which was also not opposed by the Republic was that the appellant was not given a fair hearing for lack of being provided with a court interpreter as provided for under section 211 (1) of the Criminal Procedure Act [Cap 20 R.E 2002]. The Court of Appeal examined the record of proceedings of the trial High Court. It was satisfied that the appellant was not conversant with Kiswahili but Kisukuma. Yet, the appellant was not provided with an interpreter during the trial. The Court of Appeal was settled that the omission constituted a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. At page 5 of its typed judgment, the Court of Appeal observed and held that:

> *We start by considering the issue of denial of a fair hearing. This claim originates from claims that the appellant, who did not understand Kiswahili or could not speak it well, was at times during the trial, not provided with an interpreter from Kisukuma to Kiswahili and vice versa. We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. It was a fatal omission.*

Consequently, the Court of Appeal quashed the conviction and set aside the sentence imposed by the High Court. The appellant was therefore set free. It is clear that the Court of Appeal did not in this case seriously consider whether the issue of failure to provide an interpreter was raised in the trial court. However, it is evident from the above quotation that the court only considered that the failure to provide the interpreter had prejudiced the appellant.

Similar omission occurred in the case of *Moses Mayanja @Msoke v Republic*,[386] in which the appellant was charged with and convicted of the offence of armed robbery

[386] Criminal Appeal No. 56 of 2009, Court of Appeal Tanzania, Mwanza (unreported).

and sentenced to thirty years imprisonment by the District Court of Mwanza. The appellant's first appeal to the High Court against the conviction and sentence was dismissed. The appellant was aggrieved by the decision of the High Court and decided to lodge a second appeal to the Court of Appeal. The appellant's memorandum of appeal listed five grounds of complaint against the judgment of the High Court. The Court of Appeal found the second ground of appeal compelling. The ground had it that the appellant was not given a fair trial as two purported eyewitnesses testified in a language he did not understand and without an interpreter worth compelling. As such, he could not effectively cross-examine the eyewitnesses in his bid to establish his innocence.

Upon perusal of the trial court's record, the Court of Appeal discerned the fact that the appellant, who was a Ugandan by nationality, did not understand the Kiswahili language which was used by witnesses against him. The court observed from the record that such fact was known to the prosecutors as well as the trial magistrate, even before the trial started. The Court of Appeal was also clear that court interpreter had always been provided at the trial in the District Court at the instance of the public prosecutors. However, when the two witnesses were testifying, the service of the interpreter was withdrawn for undisclosed reasons. The Court of Appeal found that the omission was highly irregular and fundamentally flawed the trial of the appellant. The Court of Appeal went further to hold that the appellant was not given a fair trial or fair hearing. It therefore expunged the relevant evidence that was given without interpretation. In so doing, it further held that there was no cogent evidence left to ground the conviction.

Consequently, the failure to provide interpretation led to the quashing of the trial proceedings and hence acquittal of the appellant. Discussing the significance of providing the interpretation to a party who does not understand the language used in the proceedings, the Court of Appeal extensively observed thus:

> *The [Criminal Procedure] Act contains many provisions guaranteeing a full hearing or a fair trial to an accused person. One of the basic and uncompromisable tenets of due process or a fair trial is that evidence in a criminal trial ought to be tendered in the presence and hearing of an accused person unless the latter for any reason, decides to absent himself. See for instance, s. 196 of the [Criminal Procedure] Act. In our considered opinion, this requirement is not fulfilled by the mere physical presence of the accused in the court room. This presence must be accompanied by his/her actual full participation in the proceedings. This right would be illusory if the proceedings are conducted in a language not fully understood by the accused. To further ensure full enjoyment of this right, the legislature included section 211 (1) in the Act.*

Section 211(1) of the [the Criminal Procedure] Act reads thus:-

> *"Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him."*
>
> *So the Act imposes a clear, positive and mandatory duty on the prosecution and the courts. The evidence must not only be interpreted to the accused but this must be done in open court, another basic attribute of a fair trial or hearing.*[387]

It is pertinent to note that failure to conduct interpretation in the manner required by the law is fatal to the proceedings as it affects the right of a party to a fair trial. This underlines that interpretation must be preceded by having a court interpreter taking an oath or making an affirmation before he provides the interpretation. The court record must as well reflect such endeavour. In such instance, the failure of the court interpreter to take an oath or affirmation before carrying out the interpretation

[387] *Moses Mayanja @Msoke v Republic* Criminal Appeal No. 59 of 2009, Court of Appeal of Tanzania, (unreported) at pages 9 and 10 of the typed judgment.

tantamount to conducting proceedings in a language not understood by the accused. This is evident in the case of *Kigundu Francis and Another v Republic*[388] decided by the Court of Appeal in 2010 where the appellant were *Hutu* and had limited understanding of Kiswahili. In the trial an interpreter was provided, but there were no record as to whether or not the interpreter was sworn or affirmed before discharging his duties in court as an interpreter. It was also not clear on the record as to whether the interpreter was a regular court interpreter who did not need to be sworn or affirmed every time. Quashing the conviction and sentence imposed upon the appellant, the Court of Appeal held among other things:

> *In Tanzania, by statute, the courts that are entrusted with the duty of administering justice and ensure fair trials, can only use two languages; Swahili and English. But that does not mean that people who do not know or understand the two languages cannot get fair trials. They can, because, under section 211 of the Criminal Procedure Act the court may, in such situations, arrange for some interpreter to translate the proceedings or evidence for the accused person or from witnesses who do not understand the language of the court. However, under section 4 (b) of the Oaths and Statutory Declarations Act (Cap 34 RE 2002) such interpreters must take judicial oaths prescribed under the Act before embarking on any interpretation.*
>
> *But in the present case, the appellants have complained that they did not understand the language of the court when their pleas were being taken. In the High Court, the learned judge on first appeal, found that, although there was no record that the interpreter was sworn, the appellants were not prejudiced. With due respect, this was a serious misdirection. So long as there is no record that the interpreter was sworn it cannot be said that the proceedings were conducted in a language that the appellants understood. That goes to the root of the principles of a fair trial. The omission is therefore incurable and vitiates all the proceedings in the two courts below.*[389]

Before the above case, the Court of Appeal in the case of *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company*[390] which was decided in 2006 had a different position as regards to the failure of an

[388] Criminal Appeal No. 314 of 2010, Court of Appeal of Tanzania, Mwanza (unreported).
[389] Ibid 6 and 7.
[390] Civil Appeal No. 95 of 2001, Court of Appeal of Tanzania, Dar es Salaam (unreported).

interpreter to take an oath before discharging his interpretation responsibilities. In this case, the appellant raised several grounds of appeal. One of the grounds of appeal was that the trial court erred in law in permitting PWl (the complainant) to be a witness and "translator"[391] at the same time for PW2 and PW3. In dealing with this issue the Court of Appeal was settled that it is mandatory for a person who acts as an interpreter of evidence in court proceedings to take an appropriate oath before discharging the interpretation duties. The court was satisfied that indeed the PW.1 who was the complainant acted as an interpreter for PW2 and PW3 without taking an oath as is required by the law.

However, the Court of Appeal thought that omission to administer the relevant oath does not necessarily render the evidence of the witness inadmissible or void. Rather, it would depend on circumstances of each case. The court eventually held that there was no miscarriage of justice that was occasioned to the appellant as he was represented by an advocate in the trial court and no objection was raised against PW.1 acting as an interpreter for PW.2 and PW3. The court was therefore of the view that the failure of the interpreter to take an oath was not fatal in the circumstances. In its holding the Court of Appeal stated that:

> *If in the circumstances, it is apparent that a party has been prejudiced by the interpretation and a miscarriage of justice is likely to have occurred, then the value of such evidence is vitiated. But in the present case in which the appellant was represented by counsel at the trial and no objection was raised against PWl acting as interpreter for PW2 and PW3, the presumption is that the appellant was not thereby prejudiced and no miscarriage of justice was likely to have occurred. We think the complaint against PWl acting as interpreter while unsworn was raised belatedly and*

[391]Although the ground of appeal used the term translator, the context of the case suggests that the appellant meant the court interpreter. For the differences between translation and translator on one hand and interpretation and interpreter on the other hand, see text to n.167-169 in chapter two of this study.

we dismiss that ground of appeal.[392]

Clearly, the stance of the Court of Appeal in the case of *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company*[393] was completely different from the case of *Kigundu Francis and Another v Republic*.[394] The difference is notwithstanding that both cases addressed more or less similar issues relating to language barrier and hence language fair trial rights. However, the case of *Interbest Investment Company Limited v Qingdao Foreign Economic Relations and Trade Company* raises an issue of impartiality of an interpreter which is an important element in any court interpretation as discussed in chapter two and four of this study. It is evident that the court did not at all address its mind on the issue of impartiality of PW1 acting as a court interpreter. In the circumstances, one cannot confidently say that the interpretation of evidence of PW2 and PW3 was conducted without bias. This is worse as the evidence given by PW2 and PW3 is not anywhere and in any form recorded in the source language. The recording of the evidence in the source language in any form would have served as a control where there is an issue relating to language barrier.

It is not the practice of courts to hear parties on objection against appointment of an individual as a court interpreter. It seems that this practice prevailed in the case at hand where the interpreter doubled as PW.1 and court interpreter. Since such interpreter had obvious interests to serve in the case, it is no doubt his appointment would have been objected had such opportunity been given to the opponent.

[392] Civil Appeal No. 95 Of 2001, Court of Appeal of Tanzania, Dar es Salaam (unreported) at page 7- 8.
[393] Ibid.
[394] Criminal Appeal No. 314 of 2010, Court of Appeal, Mwanza, (unreported).

5.2.4 Lack of Precision in Court Records

There is yet another instance of language barrier on that part of some judicial officers. The problem is increasingly becoming noticeable in proceedings and decisions of District and Resident Magistrate Courts. The most common instances are characterised by paragraphs, sentences and portions of proceedings, and decisions that are unclear and ambiguous to the extent that one cannot make sense out of them.

Undoubtedly, such instances suggest language difficulties that some judicial officers have and the challenges of instant and manual translation and recording of proceedings from Kiswahili to English. This poses challenges to the present practice that reduces judicial officers to court recorders. The duty of recording proceedings compromises their noble role of adjudication. The noble role necessarily requires judicial officers to observe, control and monitor the course of court proceedings whilst taking note of aspects that would assist them in dispensation of justice.

Language barrier affects recording of evidence by judicial officers during court proceedings. It is not uncommon for advocates to complain that certain portion of their submissions or evidence of witnesses of their clients were not recorded by courts. These instances have in recent years made members of the public to question the appointment and employment of judges and magistrates. To exemplify the magnitude of the problem, reference can be made to a ruling of one Resident Magistrate whose ruling ended up being widely circulated and discussed in newspapers and social media because it demonstrated a serious problem of English

language that the magistrate had.[395] The ruling in part reads thus:

> *Upon applicant logged before this court date 07/08/2015 done by chamber of summons supported with Affidavit swear/sworn by Mr Chamani Advocate for Applicant.*
> *As far as to day 13/08/2015 Mr Kiamani hold brief of Mr Chamani Advocate for Applicant who acquired a power of Attorney to represent the Applicant from Mr Chamani Advocate for Applicant and court allowed him to done mention it.*
> *That being the application Mr Kamani Advocate for Applicant states that:*
> *The subject matter before this court as Civil Case no. 27/2015 originated from Mwanza Urban Primary Court, as far as here by prayer under section 33(1) and 47(11) of the Magistrate's Court Act Cap 11 R.E 2002.*
>
> *That being the applicant, the applied an Advocate to be represented on that case/suit. This advocate has no right of appearance before the Primary Court to represent the client.*
>
> *Therefore I hereby granted the application it's so ordered and the respondent to be notified.*
>
> *Sgd*
> *13/08/2015*

Clearly, the language used presents significant challenges in trying to make sense of the ruling. Such difficulties were also encountered by Twaib J. In *Kurwa Thoma@ Kurwa Rashid and Another v Republic.*[396] The language used in the lower court's record for the case that was before him on appeal was so poor that the learned Judge could not clearly understand what the record meant. The learned Judge had this to say:

> *Before embarking on a consideration of the merits of this appeal, it is pertinent to make two short observations with regard to the record of the trial at the RM's Court. In the first place, saying that the English used in the record leaves much to be desired is an understatement. This provided a particular challenge to me in trying to make sense of the record.*

[395] *Ibrahimu Sadick v. Farida,* Miscellaneous Appeal Case No. 24 of 2015, District Court of Nyamagana. The ruling was delivered on 13 August 2015.
[396] Criminal Appeal No. 116 of 2008 High Court, Dar es Salaam (unreported).

It is important to note that the learned judge was astonished by the fact that the evidence on the record had so many inconsistencies that it left many questions unanswered and raised many doubts in the prosecution case. In view of the language problem observed, one could not rule out the possibility that the inconsistencies of the evidence were attributed to, poor, incorrect, and wrong recording of the evidence when it was being adduced by prosecution witnesses at the trial. Indeed, loss of evidence and distortion of witness testimonies in the court's translation process is a daily occurrence in court and is a result of language barrier. It happens whenever evidence and witness testimonies are given and instantly and manually translated and recorded from Kiswahili to English as the latter is the language of court record. It is in this context that Twaib J. in *Kurwa Thoma's* case[397] went further to state and recommend as thus:

> *The language problem underlines the necessity to look critically into the propriety of the Courts' continued practice of instant translation of Kiswahili testimonies into an English record where the witness gives evidence in Kiswahili. Most of us use English as a second or third language. Making mistakes is something to be expected. But since we are enjoined to use the language in our everyday work, we need to put extra effort to improve our language skills. Also, since in law Kiswahili is one of the two languages of our Courts, it is perhaps time to consider allowing our Courts (especially subordinate Courts) to record evidence in Kiswahili. This will minimise the possibility of wrong recording of evidence arising from the process of translation, which sometimes leads to incomprehensible records, or even distortion of facts. All these are not uncommon in our Court records and may sometimes lead to injustice.*

More recently, a ruling of the High Court of Zanzibar which was also a subject of wide circulation and debate on social media as it appeared to have serious language problem is worth noting. This was the decision in the case of *Mwanasheria Mkuu*

[397]Ibid.

Zanzibar v Idd Magamba and 13 Others. [398] Indeed, reading through the ruling one can easily find disturbing sentences and paragraphs which clearly show that English proficiency was wanting on the part of the presiding judge. Consequently, the ruling was by all standards not quite clear and confusing for want of language proficiency. One would obviously struggle as he navigates through it to get its import. It appears that the ruling was neither proofread nor edited perhaps for reason of tight schedule of the court. Arguably, had the ruling been proofread and edited, the inherent language problem would have been easily identified and eliminated. Going by this ruling, it could be properly inferred that some language problems that are inherent in court decisions and proceedings are a result of tight schedule, workload pressure and failure to properly proofread and edit the record.

The requirements for courts to read over to parties and their witnesses the evidence given and recorded at the trial proceedings has the potentials of minimising the unfairness, mis-recording of litigants' (or advocates') submissions and loss of evidence and distortion of witness testimonies.[399] This is because any error might be corrected once and for all whilst all parties and the court have fresh memories of what was given in evidence. As shown in chapter four, this study has found that such requirement is rarely complied with by presiding judicial officers.[400] The failure to comply with such requirement undermines the chance to avoid injustice as it denies

[398]Civil Case No. 3 of 2012 High Court, Zanzibar.

[399] It is important to note that the requirement for the court to read over the evidence given to the witness is provided for in section 210 of the Criminal Procedure Act [Cap. 2002 R.E]. However there is no similar provision applicable to civil proceedings. This point is extensively discussed in chapter four of this study which also compares the requirement of the court to read over the evidence to witness, accused and complaint in Resident Magistrate Courts and District Courts on one hand and the Primary Court on the other hand.

[400] The study did not find in any proceeding a record to the effect that the court read over to the parties and witnesses the evidence given and recorded in court other than in some cases a simple statement to the effect that the relevant provision was complied with.

the accused person or any other litigant or witness the right to amend or correct the errors committed by presiding judicial officers due to language barrier.[401] This is worse because the original record of the evidence given in Kiswahili is normally not kept and the principle that restricts impeachment of court record makes it hard for an aggrieved party or witness to complain against the record of the court.

Aware of the potential distortion of evidence and testimonies of witnesses when evidence and testimonies of witnesses are given in Kiswahili and instantly translated and recorded in English, appellants in the case of *Fred Otiso Kimweri and Two Others v Republic*,[402] sought to challenge the decision of the trial magistrate of the District Court of Tarime which convicted them for the offence of unlawful possession of Government trophies contrary to section 86(1) and 2(b) of the Wildlife Conservation Act, read together with paragraph 14(d) of the first schedule, and section 57(1) and 60(2) of the Economic and Organised Crimes Control Act, and sentenced them to pay a fine of T.shs. 68,335,000/= each, or serve a jail term of twenty (20) years. Aggrieved by the sentence, the appellant preferred their appeal to the High Court on six grounds of appeal. The fourth and fifth grounds of appeal are of relevance in so far as the translation of witnesses' testimonies from Kiswahili to English is concerned. The fourth and fifth grounds of appeal read as thus:

> *4. That, the trial magistrate erred in law and fact for hearing the case in Swahili language while the accused were not conversant with the proceedings conducted in Swahili.*
> *5. That, the trial magistrate erred both in law and procedure by acting as an interpreter of English language to the court while sitting as a magistrate.*

[401] Criminal Procedure Act [Cap. 20 R.E 2002], s. 210 and Rule 35 (6) of Primary Courts Criminal Procedure Code, rule 35(6) (made under the Third Schedule to the Magistrates' Courts Act [Cap 11 R.E 2002]).
[402] High Court Criminal Appeal No. 113 of 2014 (unreported).

By virtue of the above grounds, the appellants were essentially complaining that the court did not engage an interpreter as is required by section 4(b) of the Oaths and Statutory Declarations Act, [Cap 34 R.E 2002] whilst the language used was Kiswahili which the first and second appellants did not understand. On the contrary, it was argued for the respondent Republic that there was no evidence on the record showing that the appellants were not conversant with Kiswahili language. In addition, it was argued that there was no evidence to show that the trial magistrate was the translator. Rather, what was on the record was that the appellants answered the questions posed to them and they also asked questions. It was for such reasons submitted that the two grounds were without merit.

As the first ground of appeal raised was on jurisdiction which sufficiently disposed of the appeal, the High Court did not have to determine the ground of appeal that raised issues of language use and their implications on the proceedings. In any case, the case raises important issues that relate to the instant translation and recording of evidence and testimonies of witnesses which is done by a judicial officer presiding over a case. The said issues abound. They include distortion of testimonies and loss of evidence and incoherence. However, it is worth noting that the High Court in the case under discussion missed the opportunity to determine the second ground of appeal which complained against the trial magistrate for allegedly conducting interpretation.

5.2.5 Failure to Detect and Address Hearing and Speech Impairment

The law does not comprehensively deal with hearing and speech impairment. One of the notable and scant provision is found in section 128 of the Evidence Act [Cap.

6 R.E 2002] discussed in chapter four of this study. With the absence of elaborate provisions as to how courts should deal with persons with speech and/or hearing impairment in court proceedings, there is a potential for a litigant, a witness or an accused with speech and or hearing impairment not to be detected and the impairment not to be well addressed by the court.

The case of *Atilio Kitine v Republic* provides instances where hearing impairment of the accused person was accidently detected by the court as the accused person/appellant who was thought to have jumped bail was in fact within the court premises waiting for his case to be called for preliminary hearing.[403] It became clear that he did not hear when his case was called because he had serious hearing impairment. Therefore, the warrant of arrest that was issued against him had to be cancelled although no arrangement was made by the court to overcome the inherent language barrier on the accused/appellant that had serious hearing impairment. When this case came for hearing before the trial District Court, and PW.1 started to give his evidence, the trial magistrate suddenly observed that the accused/appellant had hearing impairment.

Apparently, there was nothing that was put on the record suggesting that the accused/appellant had hearing impairment as earlier detected. It was then that the trial court abruptly called the accused/appellant's brother who was sworn in to serve as an interpreter of the accused/ appellant.[404] It was in the appeal to the High Court

[403] *Atilio Kitine v Republic* DC Criminal Appeal No. 9 of 2012, High Court, Iringa (unreported).

[404] It would appear from the record that the prosecution side was not asked whether they object the accused's brother to serve as the interpreter. This is not notwithstanding that the accused's brother had obvious interest to serve in the case in which the accused was facing a charge of rape. See the case of *Cuscani v United Kingdom* (2003) 36 E.H.R.R 2 in which the accused's brother was present in court proceedings and the court

by the accused/appellant against his conviction for the offence of rape which he was charged with and the sentence imposed that the learned judge noted the anomalies relating to how the hearing was conducted at the trial. The hearing at the trial court continued despite the knowledge that the accused/appellant had serious hearing impairment. When hearing the appeal in the first instance, the learned judge observed that:

> *On 2/4/2014 when this appeal was set for hearing, the appellant appeared in person while the respondent/Republic was represented by Ms. Nichombe, learned State Attorney. In the course of hearing the appeal the appellant had nothing to say and on further inquiry from the Prison Officer who was guarding the appellant, I discovered that the appellant had serious hearing problems, almost a deaf. The Prison Officer informed the court that the Iringa Prison Authority has been facing a lot of problems to communicate with him. After a short discussion with the learned State Attorney, I decided to proceed with the hearing of the appeal basing on the grounds of appeal filed by the appellant.*
>
> *The first crucial issue in this appeal is the procedure employed by the trial District Court to conduct the case having discovered that the accused/appellant is deaf or half deaf person.*[405]

Consequently, the learned judge had this to say:

> *It is not clear how the appellant managed to understand and follow up the court proceedings from the date when the charge was read over and explained to him on 27/7/2006 and during preliminary hearing. Secondly it is not clear how the trial Magistrate discovered that Abas Kitine, the brother of the appellant was an expert in deaf-mute communication language. In addition the record of proceedings is not clear on how the interpretation was conducted especially on the defence level.*[406]

In this case, the trial judge allowed the appeal, quashed the conviction against the appellant and set aside the sentence of thirty (30) years imprisonment imposed against him.

---

was assured by the accused's counsel that in the event of any language barrier to the accused whose English knowledge was limited, the accused's brother would be able to deal with the situation. On appeal however the appellate court found that there was violation of the appellant/accused's rights to fair hearing. This case is discussed under subtitle 3.4.3 of chapter three of this study.

[405]Ibid pp. 2-3.

[406]Ibid p. 4.

5.2.6 Violation of the Law on Language of Court Record

The law on language of court records requires the records of the courts other than the Primary Courts to be written and kept in English. This law is discussed in chapter four of this study. The construction of the relevant provision is couched in mandatory terms. However, the practice of reproducing Kiswahili texts in judgments and other court records without providing their corresponding English translations is not uncommon.[407] This practice is, arguably, a violation of the law on language of court record. It would appear therefore that having texts in any other language in the court records such as judgments and rulings is not consistent with the requirements of the law. The practice is seemingly done in good cause in the pursuit for justice. In any event, it would appear that the root cause of this practice is language barrier which is inherent in the legal regime that has given room to the complicated co-existence of English and Kiswahili and in certain cases "other language" albeit in different context and status.

Conversely, this practice is predominant in cases which originate from Primary Courts in which the language of the court and court record is Kiswahili. Indeed, when records of the Primary Courts are a subject of an appeal are not translated into English. It is the appellate court that is expected to translate such records as it reflects them in its proceedings, judgment and other records. In so doing, there is a high possibility of distorting the original content and meaning of what transpired in the Primary Court and hence miscarriage of justice to either of the litigants. The

[407]See for example, *Stella Temu v Tanzania Revenue Authority* Civil Appeal No. 72 of 2002, Court of Appeal, Arusha (unreported); and *CRDB (1996) LTD v Minister for Labour and Youth Development* [2000] TLR 66, p.69 ; *Mwinyihamisi Kassimu v Zainabu Bakari* [1985]TLR 217, pp.219, 220, and 222.; *Himid Mbaye v The Brigade Commander* [1984] TLR 294, pp. 300- 301; and *Muhimbili Kamnya v Republic* [1984] TLR 325, p.334.

practice is also notable in cases where the overwhelming documentary evidence is in Kiswahili. The latter means that the courts would seemingly find it convenient to reproduce Kiswahili texts from such evidence in their decisions. Examples drawn from this practice are discussed in this chapter under sub-heading 5.4.4.

5.2.7 Delays in Disposing of Cases

The practice of instant translation and recording of Kiswahili testimonies into English record where witnesses give evidence in Kiswahili contributes to substantial delays in disposing cases.[408] This is particularly so in courts of higher hierarchy from District Courts to Court of Appeal where all court records, according to the law, are supposed to be in English language.[409] During courts trial, judicial officers carry a heavy task of listening and writing simultaneously what has been uttered by the witnesses, accused or litigants.

The task becomes even heavier in most of the cases as it is known that the majority of the people in Tanzania speak Kiswahili language, save for the foreigners who speak English language or any other of the languages known to them beside the English language. The instant translation and recording means that the court does not have time to consult any source such as dictionaries or people who are expert in the language in order to get the actual meaning of the evidence given in Kiswahili. The inherent language barrier on the part of presiding judicial officers cannot be

[408]Ibid; Namakula (n 4)13; see also Abenga, E. B. N., "Civil Practice and Procedure in Kenyan Courts: Does the Overriding Objective Principle Necessarily Improves Access to Justice for Litigants?" https://ssrn.com/abstract=2240955 (Accessed 12/08/2017).

[409]See chapter four of this study which discusses the legal regime for language uses in courts.

overruled since most of them use English as their second or third language.[410]

The implication is that the ability of a presiding judicial officer to listen to, translate and record evidence given during hearing by many witnesses is curtailed. It is not uncommon for presiding judicial officers to ask a witness to restate a portion of his testimony so that the presiding judicial officer could correctly record it in English. Indeed, such complexities including misunderstandings, failures in translation, language cultural distance among trial participants and the presiding judicial officer affect courtroom communication. Other complexities are in the presentation, recording and perception of the evidence, which challenge the credibility of a trial and hence contributing to delay of cases.[411]

Similar problems are common in appeals when the High Court experiences challenges trying to make sense of the recorded evidence.[412] All these contribute to substantial delays in the course of court proceedings. There are also some people in Tanzania particularly those in the rural areas who are more conversant with their own tribal language than Kiswahili language.[413] In normal practice, presiding judicial officers not only listen and record what has been said, but they also need to translate since the court records are kept in English language.[414]

It is undeniably true that this task is time consuming and so, it causes delay in disposing cases and eventually affects their work performance. In which case, if

[410]*Kurwa s/o Thoma @ Kurwa Rashidi* Case (n 182 and n 396). In this case, Twaib J. observed that "[m]ost of us English is a second or third language. Making mistakes is something to be expected."
[411]Namakula (n 4) 2.
[412]Ibid.
[413]It is interesting that such problem is common in lake regions as is reflected in cases discussed in this chapter.
[414]Namakula (n 4) 2, Mwakajinga (n 19) 230-233.

there were any aiding facilities or the same language was recorded, the task would have been easier than it is now. It is a pity that this practice has been in place for many years within the judiciary. It is instructive for studies to be conducted to establish the extent to which the practice has contributed to the prevalence of backlog of cases in Tanzania court system.

5.3 Comparative Aspects of Language Barrier in Primary Courts

It is considered by scholars that the use of Kiswahili language in courts does not expose court participants to the risk of language barrier as is English with its legalese.[415] It is no wonder that since this court is the lowest in the courts' hierarchy, it is closer to the people and indeed ordinary people than any other court. Therefore, the use of Kiswahili is a strategic means of ensuring that the court is easily accessed by the people and disputes referred to it are determined without any delay. It is ideally along that lines that representation of parties by advocates is not permitted.[416]

Thus, the use of Kiswahili language in Primary Courts plays a great role in so far as access to justice is concerned. The use of Kiswahili enables many people to access the court and follow court proceedings with relatively less difficulties than in a situation where cases are instituted by documents drafted in English, and proceedings conducted in English or in Kiswahili and recorded in English. Following up such proceedings including taking part during the hearing of a case before the court and understanding the gist of the letters in the court orders is in the circumstances a nightmare. The use of Kiswahili therefore reduces challenges of

[415]Unlike English language which is relatively spoken and understood by small fraction of Tanzania population, Kiswahili is widely understood and spoken in Tanzania. Thus, unlike Kiswahili, English is considered as a source of language barrier in Tanzania.

[416] See generally Twaib (n 35).

accessing the court for justice by the majority of litigants who are ignorant not only of the law of the country but also on the use of English language.

What is important to note here is that, all those documentations, writings, orders, hearings as well as judgments and rulings are in Primary Courts done in the Kiswahili language as earlier stated. What is also important to note is that such documentations are completed in a simplified manner that avoids legalese. As such, the completion of the document can easily be done by any literate person. This is by and large an outstanding feature of documents filed in the Primary Court. Most of cases examined revealed that feature. The matrimonial case of *Zaituni Selemani v Hassan Mgonja*[417] demonstrates the simplicity maintained in presenting a case in the Primary Court. The petitioner in such case had her claim presented in the following words:

> **……**
> **……**
> ***Andika Madai na habari kwa ufupi ya ukweli wa madai na lini yalitokea**:-*
>
> *Mdaiwa alikuwa mume wangu wa ndoa , tulifunga ndoa tarehe 13/08/2003 na kunipa talaka mwaka 2013 ya mdomo, pamoja na hapo nilichuma naye mali mbalimbali ikiwemo, nyumba moja Tangasisi, maduka mawili*
>
> ***Kiasi kinacho daiwa**:-*
>
> - *Uthibitisho wa talaka*
> - *Mgawanyo wa mali*
>
> *Sahihi……*
> *……..*
> *……..*
> *Tarehe 19/07/2016.*
> ……
> ……

[417] Civil Cause No. 19 of 2016 of Tanga Urban Primary Court.

When the claim was read over to the defendant on 02/09/2016 and the defendant was asked as to whether he admits the claim or not, his statement of defence recorded in Kiswahili by the presiding magistrate was as thus:

> *Mie tulioana na madai isipokuwa mdai aliondoka katika mazungumzo ambayo tulikuwa hatuna maelewano, nilimkabidhi mtoto wa ndugu na mdai aliamua kuondoka*
>
> *Mimi bado sijamuacha madai ni sijamuacha*
>
> *Sahihi ya Mdaiwa*

Clearly, the statement of claim can easily be understood by any person who understands Kiswahili although it also reflects an understanding of legal principles relating to matrimonial disputes. This is equally the case with the statement of defence given orally by the defendant in court. There is no doubt that both statements do not envisage any language barrier to any Kiswahili speaking litigant. As it appears the above statements were not a translated version of what the litigants stated. Rather, they were in the original language that the petitioner used which is Kiswahili. Having heard the parties, the trial magistrate of Tanga Urban Primary Court determined the case. The short judgment of the said trail magistrate delivered on 25/10/2016 was in simple Kiswahili that communicated the decision of the court to the litigants without posing any obvious language barrier. The last paragraph of the judgment is worth noting. It reads:

> *Mdai ameshinda dai lake na mdai apewe talaka ndani ya siku 45 na kwa makubaliano yao mdai ameshinda na mdaiwa ameshindwa mdaiwa amlipe shs 7,000,000/- kwa maana hiyo kutokana na ombi la mdaiwa kila mwezi mdaiwa atalipa shs 200,000/= kila mwezi mpaka kufikia shs 7,000,000/= hadi kufikia mwisho wa dai hii.*
>
> *Sahihi*
> *Hakimu*
> *25/10/2016*

The only obstacle apparent in the above quotation from the judgment of the Primary Court is the fact that the same was not properly punctuated. This is indeed a very common problem in the proceedings and judgments of the Primary Court which this study did not find in the discourse of the other courts. Much as the problem of punctuation can be regarded as a minor typographical error, it has potentials of occasioning miscarriage of justice. Needless to say, punctuation problem in a judgment has potentials of leading to a meaning different from one intended by the court or intended by a litigant, an accused or witness who gave the submissions or evidence in court.

Examination of criminal cases filed by individual litigants also reflect the above observations. This can be illustrated by a brief look at some records which are apparent in *Nassoro Yahaya Mkondo v Sangaiya Mainge*.[418] The complainant in this criminal matter had his complaint recorded in the Primary Court when he instituted the case. The complaint reads as follow:

> ***Jina la Mlalamikaji……..***
> ***Kazi****……*
> ***Amesema (hapa andika shitaka lenyewe au lalamiko pamoja na jina, makazi n.k ya mshitakiwa***
>
> *Ninamshitaki Singaiya Mainge kwa kosa la kuchunga mifugo – ng'ombe wake kwenye shamba letu na mwenzangu Mussa Mdaya na shamba hilo linaukubwa wa ekari 14.5 lenye mazao ya maharage thamani Tshs 2,340,000/-*
>
> *Sahihi ya mlalamikaji*
> *3/6/2013*

[418]Criminal Case No. 42 of 2013 of Kwediboma Primary Court. This case was a subject of an appeal to the District Court of Handeni and the High Court (Tanga Registry) in Criminal Appeal No. 24 of 2014 and PC Criminal Appeal No. 1 of 2016 respectively.

Having so complained and the complaint recorded as shown above, the charge was therefore formulated in the same complaint form in the following words in Kiswahili.

> ***Shitaka:*** *Kuharibu mali K/F 326(1) K/L Sura ya 16*
> ***Shauri la Jinai Na. 42 la 2013***
> ***Jina la Mshitakiwa****: Singaiya Mainge K/Mmasai Miaka 46 Mfugaji wa Elerai*
> ***Habari za Kosa****: Wewe Singaiya Mainge unashitakiwa kuwa mnamo tarehe 27/5/2013 majira ya saa 9 usiku huko shambani kwa mlalamikaji Kijiji cha Elerai Lalasa, Wilaya ya Kilindi na Mkoa wa Tanga kwenye shamba la mlalamikaji na kuharibu maharage ekari 14.5 zenye thamani ya Tshs 2,340,000/- mali ya mlalamikaji kitendo ambacho ni kinyume cha sheria.*
>
> *Tarehe 3/6/2013* *Sahihi Hakimu*

When the charge was read over to the accused person in the court on 03/06/2013, the accused person's plea was as thus in Kiswahili:

> *Mshtakiwa amesomewa mashitaka yake naye anajibu kwa maneno yake mwenyewe.*
> *Hakiri_ Sio Kweli*
> *Sahihi ya Mshtaki*
> *Sahihi ya hakimu*
> *3/6/2013*

Nevertheless, with the use of Kiswahili, it means that any litigant, accused or witness in the Primary Court who cannot understand Kiswahili language but a different language would need a facility of interpretation throughout the court processes that require his or her presence. Such interpretation will enable communication in the court proceedings. As Tanzania is known to have many tribal languages which are widely spoken in the rural areas, it is likely for the court to be faced by a situation whereby a court participant does not understand Kiswahili but a local tribal language.[419]

[419] See for instance the case of *Mpemba Mponeja v Republic* Criminal Appeal No. 256 of 2009 (17/05/2012), Court of Appeal of Tanzania, Mwanza in which the appellant was only conversant with Kisukuma. He could not follow proceedings conducted in Kiswahili.

In such circumstances, the court must get an interpreter that will interpret. When the Primary Court encounters such a situation, it means that the court will record the evidence in Kiswahili as interpreted by the interpreter as the witness is testifying. This can cause a potential problem of misinterpretation or bad translation that could impact justice. Berk-Seligson has described the problem giving several examples of language varieties and how barriers can occur and result in injustices. The description is in the following words:

> *In the sphere of court interpreting, the problem of vocabulary is an important one. In the course of a criminal trial, an interpreter might have to interpret the expert testimony of a physician or a coroner, which will include professional jargon. At another point in the trial, the interpreter may have to interpret the slang-laden testimony of a narcotics pusher, which includes vocabulary used by that social group to keep non-group members from understanding what they are communicating to each other. This use of vocabulary may also be thought of as a kind of jargon, or argot. Interpreters must be able to command the vocabulary of both types of specialized speech varieties. .*[420] *(Footnote omitted)*

Examination of proceedings and decisions of the Primary Courts reveals the extent to which such problems are experienced in practice. It is important to note that while a Primary Court case could be seen as free from any language barrier, it has potentials of raising language barrier in the appellate courts when the decision of the Primary Court becomes a subject of an appeal in the District Court and the High Court. In the case of *Consitansia Anaton v Taidini Snaga* [421] the wife had filed a petition in the Primary Court for divorce and division of property acquired during her marriage with the respondent husband. In the course of their twenty-two years of marriage, they had acquired a significant amount of property. Because of what

[420] Berk-Seligson (n 158).

[421] Matrimonial (Primary Court) Civil Appeal No 35 of 1977, High Court of Tanzania, Bukoba, original Primary Court Rulenge (Ngara District) Civil Case No 8 of 1977. This case, among others that are discussed in this section was also extensively discussed in Wanitzek and Twaib (n 4) 122.

appears as a misuse of words or a misunderstanding of the legal concepts behind them, the Primary Court granted the divorce and ruled that the wife was a '*mtumishi*' (servant) of the husband and awarded her Tshs 600/- as '*fidia*' (compensation). Aggrieved by the decision, the wife appealed to the High Court complaining in her memorandum of appeal that she was not a servant, but a wife. But she was herself also caught up in a similar language trap when she claimed, in the same memorandum, "*kwa mujibu wa sheria za ndoa nipewe kiinua mgongo kilicho halali na wala siyofidia*.' Literal translation means:

> *'in accordance with the laws relating to marriages, [I pray] for payment of retirement benefits and not compensation.'*

Indeed, the payment can legally be given only to an employee under the laws governing relations between employers and employees and never to a wife or husband in their capacities as such.[422]

The case of *Veronica Kondela v Samuel Nyando*[423] demonstrates more or less a similar problem. In this case, the wife's use of the term '*fidia*', which literally means 'compensation', was rather in the sense of "*ugawaji wa mali ya ndoa*". The term "*fidia*" is the Kiswahili terminology used in the law to refer to "division of matrimonial property."[424] The wife petitioned for divorce in the Primary Court at Sengerema and claimed for '*fidia*' (compensation) from her two years of marriage with the respondent husband. The court did not consider this claim at all which it should have taken to mean 'division of matrimonial property' instead, it merely

[422] Wanitzek and Twaib (n 4)123. See also Rwezaura (n 30) 125, where he cites the case of *Martha Robi Thimotheo v. Augustmo Kinogo*, Primary Court Tarime, Civil Case No 130 of 1966, in which the spouse used the term *'kiinua mgongo*" for her claim for maintenance.
[423] Primary Court Sengererna Civil Case No. 77 of 1984.
[424] Law of Marriage Act [Cap. 29 R.E 2002], s. 108(b).

issued an order of divorce and made no mention of the wife's claim for '*fidia*.'

Likewise, in *Christina Gati v Chinato Mwita*,[425] the wife presented a claim for *'fidia au masurufu*' (literally meaning compensation or allowances). She was partially successful in the Primary Court and was awarded four head of cattle. Aggrieved by the decision, the husband appealed to the District Court. The district magistrate found her claim for "*fidia au masurufu*" to be of no merit. The learned magistrate therefore quashed the Primary Court's order and dismissed her claims. The wife appealed to the High Court, Munyera, J., noted the wife's linguistic mistake, which seemed to have confused the district magistrate.

Nevertheless, the learned judge made a more or less similar mistake as was the district magistrate. He observed that the claim was for what the appellant termed as "*fidia au masurufu kwa muda nilioishi naye na kumfanyia kazi*." However, the district magistrate had misdirected himself as the claim reflected an issue of division of matrimonial assets and not maintenance. He also observed that the wife had misrepresented her claim by referring it as "*fidia au masurufu…*" which is not provided in the law. Discussing this confusion and misrepresentation of the claim, Wanitzek and Twaib observed:

> *The terminological problem that caught the judge here was that while it is true that the word "fidia" is not provided in law, the term "masurufu" is. But, the only way one could have seen this was by using the Kiswahili version of the Law of Marriage Act. The English version provides for 'maintenance', which denotes something the Kiswahili translation ('masurufu') could not fully reflect. The Kiswahili version of the Law of Marriage Act itself uses varying Kiswahili terms for one and the same English term "maintenance", i.e "(gharama za) utunzaji" and "(gharama za) masurufu". Since the judge*

[425] Matrimonial (Primary Court) Civil Appeal No 7 of 1985, High Court Mwanza, Original Tarime District. See also Wanitzek and Twaib (n 4) 123 for extensive discussion of this case.
Court Civil Appeal No 8 of 1984, and Primary Court Mtana Civil Case No 59 of 1984.

> *must have been used to the English version of the Law of Marriage Act, it would not have been easy for him to envisage the use of the word masurufu which was used by the petitioner and does in fact appear in law. It would have been better if the translator had stuck to the use of one (most suitable) term here. Perhaps the best Kiswahili translation for 'maintenance' in this instance would have been "gharama za utunzaji" or something similar to that, but certainly not "masurufu," which in law usually arises in an employer/employee relationship.*
>
> *It would appear that this misunderstanding is caused by a popular assumption among some ethnic groups that at the end of a marriage relationship, a compensation of some kind must be due to the wife (cf also Rwezaura 1985). The wife's formulation 'masurufu' kwa muda nilioishi naye na kumfanyia kazi' hints at that.*[426]

In legal practice, legislation and case law are among sources of law which are referred by the Primary Court magistrate when they determine cases before them. Therefore magistrates prefer to write their judgments citing statutory provisions and case law to support their decisions. However, these sources of law are usually in English language which makes it not easy for the magistrates to refer them in English language and cite them in Kiswahili language in their judgments. In this respect, many cases as this study has observed through analysing the cases in Bagamoyo Primary Courts, the magistrates usually quote the wordings or concepts or legal doctrine statements or phrases in English language as they appear for instance in a relevant legislation, case law and text book. In one case for example, the magistrate in Mwambao Primary Court could not get the Kiswahili translation for the term 'Doctrine of Recent Possession' which he applied in his judgment. The relevant part of his typed judgment reads as follows:

> *Kwanza kwa kuonekana katika miliki yake ng'ombe wanaodaiwa kufa na kupotea kwa mlalamikaji*
>
> *Pili kushindwa kutoa maelezo ya kina ya namna ya yeye kuwapata ng'ombe hao ambao mlalamikaji aliwatambua vema.*

[426] Wanitzek and Twaib (n.4) 124.

> *Tatu kupatikana nyumbani kwake mshtakiwa huyu wa pili kwa mageti ya chuma ambayo ni mali ya mlalamikaji na yote yalikuwa katika himaya ya mlalamikaji bila maelezo yoyote.*
>
> *Na hapa **"doctrine of recent possession"** inaingia*[427]

The endeavour to look for an appropriate translation as opposed to using the English version of the term is likely to contribute to delays in disposing of cases and language barrier to the litigants. In a bid to avoid distortion of meaning, magistrates find it better to be on the safe side by quoting the English texts as they appear in a relevant source without necessarily giving their corresponding Kiswahili translations. Eventually, this creates difficulties to the litigants who mostly have limited knowledge of legal language and also have limited understanding of English language. This practice of using English texts in the Primary Courts' decisions or proceedings is in violation of the law on the language of court records in Primary Courts which is Kiswahili. As earlier discussed in this chapter, this challenge also persists in the practice of the other courts where Kiswahili texts are used without their corresponding English translation contrary to the requirement of the law on the language of the court record.

In addition to the foregoing, the Primary Courts have over the years generated vocabularies which are uncommon to ordinary people speaking Kiswahili. The manner in which such vocabularies are used in the primary court proceedings is different from their usage in the community. Although such vocabularies are Kiswahili words, the context within which they are used in the court proceedings is

[427] *Twaha Abeid v Hamisi Omary and Pascal Alex* Civil Cause No. 128 of 2017, Mwambao Primary Court, Bagamoyo page 14 of the typed judgment. The Bagamoyo Primary Courts judgments which were analysed in this study reveal the prevalence of use of English statements and phrases in Primary Courts judgments. The analysis also depicts other problems which potentially lead to language barrier. The analysis of such judgments is appended to this study as APPENDIX No.3.

not clear to the ordinary people. This creates language barrier. Some of such vocabularies include, "*kukaza hukumu*", "*amri*", "*pingamizi*", and "*wadaawa.*" Other vocabularies include *"mwenendo", "hoja*", "*marejeo", "shufaa za mshitakiwa", "maombolezo"* and *"kutengua madai"*.

5.4 Responses to Language Barrier in Courts

Courts are cognisant of the significance of language to legal processes although the practical effects of the subject are avoided. There is nothing significant in the administration of justice that signifies that language use is given priority in fair trial. Unless the language barrier is raised in the proceedings by a party to the case, its effect and implication in the access to justice is presumed non-existent.[428] Judicial officers presiding over cases have over the years devised means to overcome language barrier. However, the manner in which they overcome language barrier varies from case to case depending on the circumstances of each case. There are approaches that are outstanding and well rooted in the practice of administration of justice although they have not been legislated in the rules of procedure.[429]

The judiciary recognises the importance of providing continuing judicial training to its judicial officers. Despite the trainings that have been conducted and are still being offered, the focus of the trainings has not seen much that is geared towards addressing the language barrier.[430] Apart from isolated trainings on judgment

[428]Namakula (n. 4).
[429]For example, the practice of conducting appeals or applications by written submissions.
[430]See Judiciary of Tanzania, *Draft Training Plan for 2017/2018*, Judiciary of Tanzania, Dar es Salaam, 2017. It is instructive to note that out of various trainings that are in the plan, the only training that can be said to be related to language barrier is one on judgment writing. Notably, the plan does not have nothing like training on hearing and listening skills, instant listening, translation and recording skills, Kiswahili dialect, taking and recording of proceedings, body languages,

writing, trainings focusing on language as a tool of accessing justice and as communication in administration of justice are far from becoming a reality. Such absence is notwithstanding that language is a pervasive and dynamic element that has powerful influences in the legal process.[431] It is perhaps because it is more often than not thought that judicial officers, particularly those of upper courts, do not have limited English knowledge.[432] This presumption is clearly reflected in the following text drawn from draft training plan for the judiciary 2017/2018. The text is in relation to competence of 'top officials' of the judiciary and areas that they lack expertise. The expertise that the top officials lack does not include language use in the administration of justice, which is however among the trainings listed for the supporting staff cadre.[433] The text reads as follow:

> *This group comprises of the Hon. Chief Justice, Principal Judge and all Judges (Court of Appeal and High Court). These are highly qualified in their careers ranging from Bachelor Degrees to PhDs. Despite of (sic) their qualifications, they are facing challenges on ever changing environment including emerging issues and new laws that come in place from time to time, regional and international trends, different working environments, and some of them are new to judiciary culture. The group comprise of 83 (1.3%) of the total judiciary workforce. Their roles and functions are key in dispensation of justice that calls for continuing orientation to modern issues that emanates from global and local innovations and development trends.*[434]

The foregoing is notwithstanding that lawyers are not trained in the process of protocol recording and soft skills such as active listening as part of effective communication which could be helpful in court trial. As such, judicial officers do not

---

shorthand, etc. The interview conducted revealed that although such trainings are organised and arranged to be offered in English as medium of instruction, both Kiswahili and English are being widely used.

[431]Namakula (n. 4)2

[432]Judiciary of Tanzania (n 451) 19.

[433]Ibid 20.

[434]Ibid.

have requisite technical knowhow to hear, listen, translate and record testimonies at the same time. It is in this regard that in many cases judicial officers are just busy recording testimonies without observing and recording reaction of witnesses which could be paramount to ensuring their understanding as part and parcel of fair hearing.[435]

Given the nature of the trainings offered as shown above, it means that the soft skills and methods devised and employed by judicial officers in overcoming language barrier and thus enhancing access to justice are left within the confines of the chambers of the judicial officers. As there is neither training nor research geared to providing insightful understanding of the skills and method; their utility remains untapped across wide judiciary and their weaknesses remain unknown. A few examples of such initiatives are worth of consideration herein below.

5.4.1 Extensive Use of Kiswahili in Courts

There is an increasing preference in using Kiswahili as opposed to English in oral communication between advocates and the court in court proceeding.[436] When English is spoken, it is in many cases not spoken without mixing with Kiswahili. This study has found that Kiswahili is in most cases preferred by most advocates because it is understood by their clients who accompany them in courts. Indeed, it is not uncommon for an advocate to seek leave of the court to address it or make his oral submissions in Kiswahili so that a party he is representing who is with him in

[435]The researcher had broad discussion with the former High Court Judge of Tanzania, who is the chairman of the Law Reform Commission Honourable Mr. Aloysius Kibuka Mujulizi in May, 2017.

[436]Twaib (n 35). The new trend is unlike in the past when advocates were a few and majority of whom were those who benefitted from the colonial education system which gave preference in English as medium of instruction in primary and secondary school.

the court could easily follow and understand what is happening in the court.[437] However, it was also pointed out that there were some advocates who still felt it prestigious to use English despite the presence in court of the parties they are representing. Such advocates mostly feel proud to also use English legal jargons in courts.[438]

The increasing practice of using Kiswahili in oral court communication and submissions portrays that the court fully respect the language use rights in the process of ensuring justice. The practice is consistent with the fact that Kiswahili is also a language of court although it is not the language of record in courts other than the Primary Court. On the contrary, the practice has an obvious implication of shifting from the advocates to the presiding judicial officer the burden of instant translation and recording the communication and submissions in English in the court proceedings. Consequently, the language barrier associated with such instant translation and recording is also shifted to the presiding judicial officer.

In view of the apparent limitations of instant translation and recording, the chances of the presiding judicial officer distorting the communication and the submissions in the process of translation leading to verdicts based on faulty findings of facts cannot be overruled. It is particularly so because as shown earlier court records are considered authentic and can hardly be impeached by mere assertions.[439] Therefore,

---

[437] Judge of the High Court of Tanzania, Mwanza Registry.

[438] The advocates from Bagamoyo and others who were from Dar es Salaam shared their views during the discussion with the researcher of this study. These discussions were held in the course of collecting cases and proceedings for this study in 2015.

[439] See *Nguza Vvking @ Babuseya v R.* Criminal Appeal No. 84/2004, High Court, Dar es Salaam (unreported); *Muganda Construction Company v Temeke Municipal Council* Civil Revision No. 3 of 2012, High Court, Dar es Salaam (unreported).

whilst a party or parties and their advocates may feel at ease, not distanced from his or their case and satisfied with making their case in Kiswahili, the consequences of such undertaking may have far reaching implication in the pursuit for justice.[440]As to the mixing of Kiswahili and English when advocates address the court, the following extract of dialogue recorded at Bagamoyo District Court tells it all:[441]

> ***Hon.Magistrate****: Habari zenu. Yes. You may proceed. (Beginning of dialogue)*
> ***Plaintiff Advocate****: Good Morning Mheshimiwa, I am here to represent Mrs. Mussa.*
> ***Defendant Advocate****: Good Morning Mheshimiwa namwakilisha Bwana Hassani.*
> ***Hon.Magistrate****: Ndio Wakili wa Plaintiff.*
> ***Plaintiff Advocate****: Your honour, this matter is coming today kwa kutajwa for necessary orders. Mheshimiwa we here discovered that madai yetu yapo beyond this Court's jurisdiction. Tunaomba leave ya kuwithdraw shauri letu hili ilitufile kwenye Court yenye mamlaka ya kuentertain this claim. (End of Dialogue)*

From the dialogue, it can be clearly observed that there has been mixing of the two languages of Kiswahili and English language in courtrooms. Indeed, this is how it happens in most of the court sessions where the language applied as observed by the researcher in the courts visited is a mixture of both English and Kiswahili. From the context and body language, it was clear that both the presiding judicial officer and the advocate were not only enjoying the dialogue, but also were all in a relaxed mood. Needless to say had such dialogue been in English, communication would have been tense and brief which would have underlined language barrier.

At the extreme end of the increasing use of Kiswahili in courts other than the Primary Courts, there is a rare instance of litigants drafting their pleadings and other court documents in Kiswahili as opposed to the established practice of drafting them in English. A few instances that have seen litigants resorting to this approach have

[440]Namakula (n 4) 2 discussing the implications to fair hearing of using more than one language in proceedings; Massay (n 119). Massay observes that language barrier resulting from the use of English has a tendency of distancing a party from his case.

[441] Held on 18/09/2014 in one of the several district court proceedings at 9.30 am.

found the court condoning the practice. In doing so, the court takes into account that the parties are laypersons and are unassisted by counsel.[442]

5.4.2 Resorting to Written Submissions

This study observed that, due to various challenges faced by participants in court proceedings including the court itself, written submissions are resorted to as an alternative to making oral submissions although the same is not explicitly provided for in the law. This approach is very common in cases that do not involve calling witnesses to adduce oral evidence. They include applications, appeals, reviews, revisions, and preliminary objections. Among considerations that are taken into account in granting leave to have such cases argued by written submissions include circumstances of each individual case, convenience of the court, convenience of the counsel representing the parties, convenience of unrepresented parties, and the need to allow time for counsel or parties to conduct thorough and informative legal research.

Despite such considerations, the need for an unrepresented party to seek legal assistance from a person who can help him to prepare his submission in English is a paramount factor that the court considers. It is not unusual for the courts to order a case to be argued by written submissions where a party or both parties are unrepresented. While such a party or parties would have already filed his or their respective pleadings, applications, and counter-affidavits in the court, they may not be in a position to make any sense of such documents as they were prepared for them

[442]See for instance *Shariff Ahmed Salim v Kullaten Abdallah Khamis* Civil Application No. 3 of 2006 ZNZ Court of Appeal (unreported). As also shown in chapter four of this study, the court in this case observed that: "The application in this Court is supported by the applicant's affidavit which, like the Notice of Motion, is in Kiswahili. Normally such documents should be in English but since the parties are laymen and were unassisted by counsel, I am not making it an issue."

in English by an advocate or a lawyer who is not in court. It is in this context that Massay described the legal barrier inherent in appeal cases in the following words:

> *As stated earlier, the language of record ….. is English. The party is served in case of appeal with memorandum of appeal and has to file his reply to the memorandum of appeal in …… English language. Proceedings and the judgment are also written in English. Without the service of translators or an advocate, the party will effectively be unable to plead his case because he can't engage with it and follow what is going on.*[443]

Written submission is therefore a means that presents an opportunity for a party to overcome language barrier and the risks of getting his oral submission's strength lost in the course of translation and recording by the presiding judicial officer. However, when unrepresented laypersons are required to file written submission, they are exposed to other potential risks. One of such risks is that of failing to file a written submission within the timeframe set by the court.[444] This happens often times because getting a qualified person to offer such services of preparing such submission may not be easy. Financial constraints may equally enhance the challenge as is the issue of availing all the record to a person who agrees to offer the service. The other risk is that of failing to availing a complete set of record of the court that would enable a person providing the assistance to understand the case before preparing the submissions. As a result, the written submission that a party may get and file before the court may not be consistent with the record.

---

[443]Massay (n 119) 3 and 4.

[444]This risk is so serious because the filing of written submissions is tantamount to a hearing of a case and therefore a failure of a party to file written submission as ordered by the court without lawful cause amounts to failure of such party to prosecute his case or to appear in court for a hearing. It is also the principle of the law that written submission which is filed outside the period specified in the court's order and without leave of the court ought not to be considered by the court. See for example *Said Kinyanyite v Fatuma Hassan and Another* Civil Appeal No. 87 of 2003 High Court, Dar es Salaam (unreported); *Hiday Zuberi v Bogwe Mbwana***,** (PC) Civil Appeal No. 98 of 2003, High Court, Dar-es-Salaam (unreported); *Buyamba John v Adili Bank Corporation Ltd & Another***,** Civil Case No. 146 of 2000 , High Court, Dar-es-Salaam (unreported) and *Fatuma Khassim v Tabu Prosper* (PC) Criminal Appeal No. 12 of 2002, High Court, Dar es Salaam (Unreported); and *Leonard Magesav M/S OLAM (T) LTD* Civil Application No. 11 of 2015, Court of Appeal, Mwanza (unreported).

As written submissions enable a party's case to be presented without the risk of loss and distortion in the process of recording the submissions by presiding judicial officer, advocates representing parties in cases which can be conducted by written submission tend also to prefer resorting to it. Coupled with the absence of such risk, it also enable advocates to restructure, review and present their submissions with detailed authorities without necessarily overburdening the presiding judicial officer by extensive oral submissions that the judicial officer must instantly and manually record. Limited knowledge of spoken English to some advocates is another factor that contributes to the increasing preference to written submissions.

5.4.3 Translation and Interpretation by the Court

Since the language of the record in the courts other than the Primary Courts is English, the documents that are used in instituting a case and the replies thereof must always be in English. As shown earlier unrepresented party would always have to struggle before he gets assistances of a legally trained person to prepare the document or a reply for him. However, such struggle is not the only one. Such a party has later to present his case either by leading evidence or arguing it by oral or written submissions depending on the nature and type of the case that is before the court. It is common place for such unrepresented party not to have a clue of the nature and thrust of his case as reflected in the pleadings or any document already filed in the court. As a result, presiding judicial officers have found themselves obliged to translate or interpret the contents of such parties' case as contained in the pleadings or any relevant document relating to the case and the consequent court proceedings.

Such practice of translating and interpreting the pleadings by judicial officers is in addition to explaining the procedures that the parties must conform. It is no doubt that Kwikima Ag J.,(as he then was), Mkwawa J., (as he then was) and Chris Peter had this approach in mind when they respectively emphasised on furnishing unrepresented laypersons with guidance as opposed to bombarding them with Latin and other jargons and invoking procedural rules to defeat the course for justice. [445] In many cases such unrepresented parties will engage in extraneous matters that are not before the court and adopt their respective documents as part of their submission.[446]

5.4.4 Translating and Pronouncing Judgments in Kiswahili

Consistent with the above, the courts have also inculcated a practice of giving or allowing loose translation of documents from Kiswahili to English and vice versa. Such practice is preferred when it appears necessary to do so in the interest of justice and overcoming language barrier. Application of this practice is apparent in proceedings where the court finds it convenient to reproduce relevant Kiswahili texts with their corresponding English loose translation and vice versa. Such instances are also not uncommon in judgments. In *Kinoedi Alawi Mkwanda and Two Others v Mwanahawa Alawi Mkwanda,*[447] Shangwa J (as he then was) wrote:

> *To begin with, I will deal with the second ground of appeal in which the appellants are faulting the District Court's finding that there is evidence to show that house No.52 J at Manzese Darajani was constructed jointly by the deceased and the respondent. As a matter of fact, the District Court did*

[445] Text to n 17 – 18.

[446] See *Festo Sango v Andason Sango and Others* PC Criminal Appeal No. 9 of 2012, High Court, Iringa (unreported) where Madam Shangali, J. observed in her judgment thus: "In the hearing, the appellant appeared in person and unrepresented by an advocate. Being a layman he could not assist this court much to elaborate his grounds of appeal. He simply asked this court to adopt and consider his two grounds of appeal and allow the appeal. As a result I took pain to critically examine the record of proceedings and decisions of the both two lower courts."

[447] PC Civil Appeal No. 155 of 2003 High Court, Dar es Salaam (unreported).

not err in so finding. There is evidence on record to show that the said house was jointly constructed by the deceased and the respondent. Such evidence is contained in exhibit "A" in which the deceased categorically states so in the following Kiswahili words:

" ... Nyumba niliyoijenga na Mwanangu Mwanahawa D/O Alawi Hassan Mkwanda".

Translated into English those words would read as follows:

" The house which I constructed <u>jointly</u> with my daughter Mwanahawa Alawi Hassan Mkwanda"(Emphasis added).[448]

In the case of *S.M.Z v Machano Khamis Ali & 17 Others*[449], the court made the following translation:

The court was faced with a similar situation in Seif Shariff Hamad vs SMZ, Criminal Appeal No. 171 of 1992 (unreported)…..We mused over a number of incongruent provisions of the two constitutions and after that we had this to say on page 18 of the type-written judgment:

Tunapendekeza kuwa mamlaka zinazohusika katika pande zote mbili za muungano zichukue hatua zipasazo kusawazisha vifungu hivi na vingine vyenye utata ama uwezekano wa kuleta utata baina ya hizi katiba mbili.

A free translation would be: "We recommend to the relevant authorities on both sides of the Union, to make necessary steps to harmonize these conflicting sections and other sections of the two constitutions which are potentially irreconcilable."

Similar practice was adopted by the court in *Naima Hamad Ali and Another v Shinuna Kheir Juma and 4 Others,*[450] as is clearly evident in the following extract:

In essence, this appeal arises from a District Kadhi's Court Case No. 385 of 2006 sitting at Mwanakwerekwe, Zanzibar. Looking at the original plaintiffs plaint, at item No. 6, the plaintiffs claimed as follows:-

"Wadai wanadai sehemu yao ya urithi aliouwacha marehemu Kheri Juma Sadiki <u>ikiwa ni nyumba</u>……"

[448]Ibid 5-6.
[449] Criminal Application No. 8 of 2000 Court of Appeal, Zanzibar (unreported).
[450] Civil Appeal No. 47 of 2011 Court of Appeal, Zanzibar (unreported).

> *A literal translation to the plaintiffs claim before the Kadhi's Court is that they were claiming for their portion of inheritance of the assets left by the late Kheri Juma Sadiki. This clearly shows that what was claimed by the appellants at the Kadhi's Court was the inheritance of the assets left by the late Kheri Juma Sadiki.[Emphasis added]*

In addition to that, the prayers as found in the plaint reads as follows:-

> *"Mahakama itowe amri ya kuuzwa mali zote na kukusanywe (sic)ikiwa chini ya uangalifu wa wakfu na mali amana na kugawiwa kwa kila mrithi kwa mujibu wa sheria."*

> *From a (sic) reading of the claim the appellants prayed in their plaint for the orders of the Kadhi's Court that the deceased's assets be divided to heirs according to Islamic law. That means, the appellants before the Kadhi's Court where the case originated prayed for the assets to be inherited according to Islamic law.*[451]

It is evident from the above translations that one cannot avoid to ponder on whether they realistically correspond with the true meaning of the original documents. In *Naima Hamad Ali and Another v Shinuna Kheir Juma and 4 Others*[452] for example one may wonder whether the claim was for assets or an asset (a house). Equally, *Kinoedi Alawi Mkwanda and Two Others v Mwanahawa Alawi Mkwanda,*[453] addition of the word "jointly" which in Kiswahili could be translated as "*pamoja*" might appear as a distortion of the original Kiswahili version which did not carry the word "*pamoja*." Whilst the practice is a step in the right direction of overcoming language barrier, it reveals the limitations of translation in overcoming language barrier in court proceedings that could affect trial fairness. It also demonstrates the potential complexity and shortfalls in translation, a key aid frequently used by the court in aiding communication and pleading in court proceedings. This raises doubts

[451] Ibid p. 2-3.
[452] Civil Appeal No. 47 of 2011 Court of Appeal, Zanzibar (unreported).
[453] PC Civil Appeal No. 155 of 2003, High Court, Dar es Salaam (unreported),

as to the expertise of judicial officers in discharging translation and interpretation duties as part of their judicial function.

To the extent that translation runs risk of distortion and loss of the truth, the courts have endeavoured to overcome such risk by, for example, strictly adhering to the meaning of the text as presented in the original document. In *S.M.Z v Machano Khamis Ali & 17 Others*[454]the court observed that:

> *The starting point for our determination is what Mr. Mbwezeleni pointed out, and which was repeated by Mr. Musa, the provisions of Article 1 of the Union Constitution:*
>
> *Tanzania ni nchi moja na ni Jamhuri ya Muungano.*
>
> *That has been translated in English as "Tanzania is one State and is a sovereign United Republic." An element of sovereignty, which does not appear in the Kiswahili version has been introduced in the English version. Admittedly, we are not aware of a single Kiswahili word for sovereignty. This Court said in Daudi Pete v Republic [1993] TLR 22 at p. 33 that the controlling version of the Constitution is the Kiswahili one and not the English version because the Constitution was enacted in Kiswahili. So, the translation should be in "Tanzania is one country and is a United Republic."*[455]

On the other hand, the approach of the court in some other cases is different when the text relied upon is in Kiswahili. Instead of reproducing the Kiswahili text along with its loose English translation, the court would simply reproduce the Kiswahili version. This is perhaps because Kiswahili is presumed to be widely spoken and understood by the majority of the people in Tanzania. Hence, the use of Kiswahili texts without corresponding English translation is therefore not expected to occasion a language barrier to anyone. A good example and interesting to look at is in *Stella*

[454]*S.M.Z v Machano Khamis Ali & 17 Others* Criminal Application No. 8 of 2000 Court of Appeal of Tanzania, Zanzibar (unreported).
[455]Ibid14.

Temu v Tanzania Revenue Authority.[456] In this case the Court of Appeal extensively reproduced and relied on Kiswahili text. The judgment consists of eighteen (18) pages. In the first and second page, the following quotation was reproduced extensively in Kiswahili as follow.

> *...Stella, like others was taken to TRA from MOF. She was given by TRA a letter, Exh P 1, of 17 June, 1996, titled " Kuajiriwa na Mamlaka ya Mapato Tanzania", which reads, in relevant parts, as follows:*
>
> > *... Hivyo wafanyakazi wote wa sasa wa idara za Kodi chini ya Wizara ya Fedha wanatakiwa kuajiriwa upya kwa masharti ya Mamlaka ya Mapato.*
> > *... Kwa kuzingatia maelezo chini ya aya ya pili hapo juu, nafurahi kukujulisha kuwa imeamuliwa uajiriwe katika Mamlaka ya Mapato tangu tarehe 1 Julai, 1996.*
> > *Hata hivyo utakua katika kipindi cha majaribio (probation) kwa muda wa mwaka mmoja tangu tarehe ya kukubali ajira hii. Endapo utendaji wako wa kazi na tabia yako vitaonekana kukidhi matakwa ya ajira ndani ya Mamlaka, utathibitishwa kazini.*
>
> *Stella accepted the offer by her letter dated 16 July, 1996, Exh. P.3, which reads in the relevant part:*
> *Nachukua fursa hii kukuarifu kuwa nimekubali uteuzi huo kwa masharti yaliyoelezwa na mengine yatakayoamuliwa na Bodi ya Wakurugenzi.*
> *On 16 June, 1997 she was given another letter, Exh.P 5, titled "Kutokuthibitishwa Kazini Katika Mamlaka ya Mapato Tanzania" and reads, in relevant parts, as follows:*
>
> > *…… Katika barua hiyo tulikueleza pamoja na mambo mengine kuwa utakuwa katika kipindi cha majaribio kwa muda wa mwaka mmoja kuanzia tarehe 1 Julai, 1996 hadi tarehe 30 Juni, 1997. Kutokana na tathmini tuliyofanyiwa kuwa hautathibitishwa kazini.*
> > *Kufuatana na maelezo na uamuzi wa Serikali, TRA inakurudisha Wizara ya Fedha kuanzia tarehe 1/7/1997. Tafadhali wasiliana na Katibu Mkuu kwa maelezo zaidi.*
>
> *Stella decided not to report to MOF but over a year later, on 6th January, 1999, she filed a suit against TRA alleging wrongful termination of employment, that the termination was not done by a competent authority, that she was not given the right to be heard, that the letter of termination, Exh. P. 5, was defamatory, and that no reasons were given to her for the termination……*

[456] *Stella Temu v Tanzania Revenue Authority*, Civil Appeal No. 72 of 2002, Court Appeal of Tanzania, Arusha (unreported).

Such long paragraphs of Kiswahili texts are also found from page 7 to 9 of the above judgment. This is an example of many other cases on how the court uses both Kiswahili and English language in judgments to suit its mission. This study has revealed that the courts sometimes refrain from translating Kiswahili texts into English for fear of loss and distortion of the original meaning of the text. Such practice seems to be preferred in a situation where the relevant Kiswahili text is at the root of the case.[457] Surely, the choice of words must be cautiously and correctly pursued to avoid miscarriage of justice that may result from loss and distortion of meaning.

Despite the above practice of loose and free translation and reproduction of Kiswahili text without its corresponding translation, the approach of the court is different when the evidence and testimony is given by a witness. In such situation, the court would ordinarily and as a matter of practice require the witness to produce a translated document certified by a recognised body such as the National Kiswahili Council of Tanzania. Short of that such evidence is not admitted.[458] This is particularly so when the translation is from a language other than English to Kiswahili.[459]

---

[457] The implication of this practice on the law of the language of court record has been dealt with in this study under subtitle 5.2.6 of this chapter.

[458] *Segwino Eric v Niyongabo Prudence*, Commercial Case No. 91 of 2001, High Court Commercial Division (unreported). In this case, the court discredited the agreement translated from Kirundi language to Kiswahili because the translation was not certified. As discussed in chapter four of this study, there is no statutory provision that requires certification of a translated document. Perhaps the only exception is rule 8 of the Probate and Administration Rules [Cap. 352 R.E 2002]. The latter requires a translator of a document in a probate cause to verify by an affidavit that the translation is true and faithful.

[459] See *Maneno Ismail And Tuqiang T/A Litan Trading Co v Wang Yong Olang* Commercial Case No. 21 of 2008, High Court Commercial Division (unreported); and *Segwino Eric v Niyongabo Prudence* Commercial Case No. 91 of 2001, High Court (Commercial Division) (unreported).

In the case of *Re Aloysius Benedicto Rutaihwa*[460] the approach of the court was however different. The difference is reflected on how the court dealt with the will of late Benedicto Rutaihwa which was written in English and *Kihaya*. The court noted that at the root of the matter there was a "will" which was written in English and *Kihaya*. The court appeared to be satisfied by the fact that the will was accompanied by its English translation. However, it was not clear from the judgment whether the will was translated by a translator in accordance with rule 8 of the Probate and Administration Rules, let alone in accordance with the practice requiring certification. The rule 8 of the Probate and Administration Rules requires the court to cause a will written in a language other than English to be translated and an affidavit of the translator verifying that the translation was true and faithful to accompany the petition. The court maintained that:

> *Another thing which I have seriously considered in deciding the matter is the nature of the "will" itself. The same is written in English and Kihaya languages. That is some parts are written in Kihaya while others are written in English. There is, however, a translated version of the said will. Another important thing concerning the said "will" is that it is written in a note book and in the form of a diary. However, if one reads the note book (will) carefully will note that the Oldman, who was a magistrate was expressing his wishes on how his estates would be managed after his death.*
> ……
> ……..
> *I am therefore satisfied that the said "will" was indeed made (written) by the testator Benedicto Joseph Rutaihwa…..*

On the other side of the spectrum, there is a widely used practice of pronouncing judgments written in English in Kiswahili language. The practice is inconsistent with the language of the court record. It however commensurate with the practice of

[460] Probate and Administration Cause No. 1 of 2013, High Court, Bukoba (unreported).

conducting cases in Kiswahili. It was clear in this study that the judicial officers prefer to pronounce their decisions in Kiswahili as opposed to English language used in writing the decisions. While this practice is good, it exposes the court to the risk of loss of reasoning inherent in the decision. It may occur that a layperson may find that the English decision is completely different from one pronounced in Kiswahili. At the extreme end of this approach is the practice of delivering a judgment in the language of the court (English language) along with its official Kiswahili translation.

The practice was in recent years used by the Court of Appeal in the famous case of *Hamisi Rajabu Dibagula v Republic*.[461] In this case, the Court of Appeal issued the judgment in English along with its Kiswahili translation. In so doing, the court took account of public interests that were involved in the case and hence the need for the decision to be clearly understood without risk of mistranslation. This is an exemplary case which has indicated that translating judgments in Kiswahili and making such copies available can be done to avert the problem of language barrier.

5.4.5 Using Affidavit Evidence as Opposed to Oral evidence

The Law Reform Commission of Tanzania has recently proposed reform that would lead to a plaintiff who files a civil case in the courts of law, to file his plaint along with affidavits of his witnesses. The affidavits would replace the oral evidence in chief which is presently adduced by such witnesses during trial. This proposal has so far been incorporated and brought into force in election petition. It symbolises a

[461]Criminal Appeal No. 53 of 2001, Court of Appeal, Dar es Salaam (unreported). In this case, the Court encapsulated the sensitive issue of religion and provided auspicious principles on how to address the whole question of freedom of worship. In addition, the Court provided guidance to lower Courts on the need for applicants to utilise all avenues of pursuit of rights before applying for revision. The two versions of Kiswahili and English judgements are appended as APPENDIX No.4 of this study.

radical departure from previous practice of giving oral evidence in chief under oath or affirmation. It entails a witness giving his or her evidence in chief by a sworn or affirmed affidavit which must be filed before the court.[462] The witness is thereafter cross-examined and re-examined accordingly. The requirement for an affidavit of a witness to be filed in the court is intended to achieve expeditious resolution of disputes.

Considering the time consumed in translating and recording evidence given in Kiswahili into English, the filing of affidavit evidence also serve another important purpose. It minimises loss and distortion of evidence in the process of instant translation and recording by a presiding judicial officer. In so far as electoral disputes are concerned, the chief justice is empowered by the National Elections Act, Cap 343 to make rules to regulate the practice and procedure to be followed by the court in handling election petitions. In the exercise of these powers, chief justice promulgated the National Elections (Election Petitions) Rules 2010 GN 447 of 2010. Subsequently, the rules were amended in 2012; vide the National Election (Election Petitions) (Amendment) Rule 2012 G.N 106 of 2012 with a view to promoting efficiency in the management and disposal of future election petitions.

It is not without significance to note that the need to promote efficiency in the management and disposal of election petitions necessarily included the need to

[462]See rule 21A of the Election Petitions (Election Petitions) (Amendment) Rules 2012, GN 106 of 2012 which governs the giving of affidavit evidence by witnesses. These radical reforms became effective on 30/03 2012. They signified a radical departure from the previous practice of giving oral evidence under oath or affirmation which had many shortcomings. The shortcomings included delays in disposition of cases and loss and distortion of evidence in the process of taking, translating from Kiswahili to English and recording the evidence. See also *Zella Adam Abrahaman and 2 Others v AG and 6 Others,* Consolidated Civil Revision Nos 1, 2, 3 & 4 of 2016, Court of Appeal of Tanzania, Dar es Salaam (unreported) which discussed the requirement as to giving affidavit evidence.

overcome potential limitations of instant translation and recording of evidence from Kiswahili to English. This was no doubt among the considerations given the fact that election petitions, because of their critical constitutional significance, attract many witnesses whose testimonies must be taken and recorded in the language of the court record. Apparently, the court must in such election cases endeavour to preserve the sanctity of the will of the people and not subverting it and thereby promoting enjoyment of article 21 of the Constitution governing right to freedom in the participation of public affairs.[463] Although these radical reforms signifying a radical departure from the practice of giving oral evidence are important in overcoming language barrier in the translation and recording of evidence, it is yet to be extended to other cases. The reforms undertaken thus far are nevertheless a step in the right direction.

5.4.6 The Test "Whether the Language Barrier was Raised in Trial"

The legal process does not seem to recognise language fair trial rights as priority rights. As such, the principle that has been applied as a response to language barrier complaints in appeal has tended to affect the victims of language barrier. The appellate courts are known to invoke a well-known principle that looks into whether the complaint raised at the appellate court was raised and dealt with at the trial court. Accordingly, if the complaint was never raised in the trial court, the principle is that such complaint cannot be entertained and dealt with in the appeal. Apparently, the preoccupation of the court here is not whether or not a party indeed went through such difficulty.

[463]Ibid.

Consequently, if a party suffered from language barrier, the application of the principle would not give way to a positive outcome to the appealing party as long as he did not complain about the problem in the trial. In *Kashindi Ramadhani @Moba Pascal v The Republic*,[464] a number of points were canvassed in the memorandum of appeal. Among three points raised by the appellant was that the trial was not a fair one because the appellant was not accorded the services of the interpreter. Dismissing this ground and the appeal, the Court of Appeal observed that:

> *The record before us is loud and clear that the appellant did not canvass this point. On the contrary, the record bears us out that he readily participated in the trial by offering his plea in Swahili thus ''Uongo'', and subsequently participated in the trial by cross-examining the prosecution witness, putting up his defence, etc. All this shows that there was no question of language barrier in the conduct of the proceedings as he was very much alive as to what was going on.*

Similar principle was invoked in *Robert Edward Moringe @ Kadogoo v The Republic*,[465] to dismiss the applicant's grounds of review that he did not quite follow the proceedings at the appeal stage because the court used English instead of Kiswahili language. And that at the hearing of the appeal, his advocate came up with his own grounds of appeal instead of arguing the ones he had given to him. As was shown previously in this chapter, the Court of Appeal ruled that the ground on language barrier was an afterthought. The court argued that the applicant was in

---

[464]Criminal Appeal No. 268 of 2008, Court of Appeal of Tanzania, Tabora (unreported). The appeal arises from the decision of the High Court of Tanzania Tabora (Kaduri, J) upholding the conviction of the appellant for armed robbery and unlawful possession of firearm by the District Court of Kigoma (Ishengoma, DM.) Initially, in the trial District Court the appellant was sentenced to thirty years, while in the first appeal to the High Court, the sentence of thirty years was substituted with one of life Imprisonment. In the second appeal before the Court of Appeal, the appeal was dismissed, the sentence to thirty years was restored as meted by the trial District Court.

[465] Criminal Application No.9 of 2005, Court of Appeal of Tanzania, Dar es Salaam. In this case, the court was being asked to review its decision in Criminal Appeal No. 196 of 2004 dated 1 August 2005. The High Court (Nchalla, J.) sitting at Arusha convicted the applicant of the murder of Kassim Rashid on 25 December 1990 at Msitu wa Kati, Monduli Juu, Monduli District in Arusha in Arusha Region. Consequently, the applicant was sentenced to suffer death by hanging. On appeal, the conviction and sentence were upheld by this Court in the decision that is sought to be reviewed.

court when the appeal was heard and yet he did not object any limitation as to his understanding of the English language. The court stated as follows:

> *We heard the appeal in English because of Mr. Chadha's limited knowledge of Swahili language. At any rate even if the hearing of the appeal had been conducted wholly in Kiswahili the overall result of the appeal would still not be affected.*

Understandably, the decision in the second case was in line with the position of law in the case of *Melita Naikiminjal and Loishilaari Nakiminjal v Sailevo Loibangu*,[466] where it was held *inter alia*, that "an issue raised before the first appellate court cannot for the first time be raised before the second appellate court.

The main issue in both cases was on language and that the court generally decided that the ground raised in both cases were afterthought. The slight divergence one can deduce from these cases is as follow: In the first case, the appellant raised the issue of language barrier by complaining for not having an interpreter, whereas in the second case the applicant argued that he could not understand the language used. Secondly, in the second case which the researcher found it to be quite amusing, the applicant complained on the grounds submitted by his legal counsel before the court that it was not what he had instructed him to argue.

Nevertheless, the court acknowledged the fact that the learned advocate came up with his own grounds which was put in English because he was more conversant in it than Kiswahili language. This is quite the opposite of his client who was not conversant in English language. The court also admitted to disapprove the learned advocate's grounds. However, the court contended that the applicant had no basis

[466] [1998] TLR 120.

because the appeal was determined based on circumstantial evidence. One cannot stop to wonder whether the applicant was really represented considering that legal representation is one of his human and constitutional rights.

Another relevant issue in the circumstances of the second case is whether the applicant was heard in his appeal to the Court of Appeal. In any case, the whole problem in the case revolves on the issue of language barrier and its implications to litigants and accused persons and particularly the lay persons. Without any scepticism the court should be concerned with the applicant and not the learned advocate because he is the one facing the charges. In other words, the court did acknowledge that they did let the advocate use English language which he was more conversant with than Kiswahili language and also agreed that the grounds he put forward were different from those of the applicant who claimed they differed on the grounds he instructed him to present.

Furthermore, in relation to the second case one may ponder on whether a person who is represented by a learned advocate in court relinquishes his right to make a follow up the court proceedings. The legal maxim *vigilantibus et non dormientibus jura subveniunt*, which is translated as the law aids the vigilant and not the indolent would mean that such person is indeed entitled to follow up his case.[467]It therefore

[467] According to Mehta, Justice Lampkin wrote of:
"... two maxims, one of them under Common law and the other at equity: *vigilantibus non dormientibus, jura subveniunt* – the laws come to the aid of those who are vigilant, not those who sleep on their rights, which was the maxim at Common law. And *vigilantibus non dormientibus, aequitas succurrit* in equity comes to the aid of those who are vigilant, not those who sleep on their rights, which was the maxim under equity and gave rise to the defence of laches in equity."http://www.duhaime.org/LegalDictionary/V/VigilantibusEtNonDormientibusJuraSubveniunt.aspx (Accessed 12/12/2017).

follows that the applicant was entitled to be vigilant and not indolent in striving for his rights. This is precisely what the applicant was trying to do.[468]Arguably, the court, in this case, erred in its reasoning. As such, the court should have given a proper thought on the issue at hand as it involved an applicant who was convicted of murder and sentenced to suffer death by hanging. Unfortunately however, at the end, both the appeal and the application were dismissed.

5.5 Conclusion

This chapter explored the language use in Mainland Tanzania courts, [469]knowledge of language as a component for justice and the attendant legal and practical aspects of language barrier in court proceedings. It also underscores the perspectives of the judicial officers in language barrier in court proceedings. In so doing, the chapter has analysed instances and implications of language barrier using various decided cases. The chapter shows how language barrier occurs and does a great damage to the administration and delivery of justice by the courts.

Moreover, the chapter shows that language barrier should not be considered lightly rather, it should be considered seriously and resolved once and for all. It would appear that the court does not consider language fair trial rights as priority rights. Had it been so, most of the language barrier instances would have been avoided or reduced to a considerable extent. Nevertheless, there are instances suggesting that judicial officers are cognisant of persistence of language barrier in court proceedings and have over the years devised the means to overcome it.

---

[468]*Robert Edward Moringe @ Kadogoo v The Republic*, Criminal Application No.9 of 2005, Court of Appeal of Tanzania, Dar es Salaam (unreported).
[469]Courts other than the Primary Court.

The instances and implications pointed out above and the circumstances in which they occur are an example of the worst situations that people, especially unrepresented ones, are experiencing in courts. It is evident that the courts and therefore judicial officers are cognizant of the language barrier and have devised ad hoc means to address it as there are only a handful of specific approaches established in the law.

It is an undisputed fact that the problem of language as discussed in this chapter leads to many questions as to the access and delivery of justice in the courts. The court functions well if there is absence of language barrier. This is, when there is clear understanding among judicial officers, parties to the cases, witnesses and other people in the courtroom as a result of sharing the language that is understood and used by every courtroom participants and stakeholders. In this context, the courts need to have effective facilities for interpretation and translation, which will be employed in the event the court participants have limited proficiency in the language use in court proceedings. However, such interpretation must be undertaken by competent and skilled individuals, without whom the process of interpretation may most likely open itself to potential errors and misunderstandings. [470]

The central notion of access to justice is that court users must be able to participate meaningfully in their own cases. It is essentially important to involve court clients seeking justice but they should possess the ability to understand the proceedings and

[470] As discussed in this chapter, there is no systematised mechanism in place for court interpreters. If such opportunity is not provided by the parties in court, it is very likely to lead to miscarriage of justice as it has been seen to be the case with some of the cases analysed in this chapter. See Mwakajinga (n 19) 230-233.

to communicate with the judicial officers and counsels as a precondition. Thus, this makes Kiswahili and English language a prerequisite for effective communication in the courtroom in Tanzania.[471] However, the use of the two languages without effective facilities for interpretation, translation and recording of proceedings and evidence have tended to increase the risk associated with language barrier.

[471] Ideally, all court officials should be able to speak all official languages of the court. The reality, however, is that presently, this is not the case. There are some judicial officers as mentioned in the cases in this chapter who find it really hard to use the English language in court.

CHAPTER SIX

6.0 CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This chapter concludes the study. It summarises the main conclusions that emerged from different chapters of this study. It flags out the contribution to knowledge which was made by this study before giving recommendations and possible avenues for further direction of research.

6.2 Main Insights of the Study and Key Findings

The problem addressed by this study is language barrier in accessing justice in Mainland Tanzanian courts. It was pointed out that the problem is multidimensional. On one hand, the problem was seen as being inherent in the persistent and predominant use of English language as a language of law, court and court records whilst the use of Kiswahili was marginally restricted to the Primary Courts and a great deal of all court room communications. On the other hand, the problem was inherent in the complicated co-existence of the two languages in the court proceedings albeit in different context and status.

The language use in court proceedings is regulated by the law, which is dealt within chapter four of this study. It was found that the legal regime for language use in Mainland Tanzania Courts anticipates occurrence of language barrier in court proceedings. It therefore sets out means to address such occurrences. One of the important findings of this study is that the language use in Mainland Tanzania, particularly in matters relating to court interpretation and language use in criminal justice system is in certain respects consistent with the international benchmarks.

Such findings are reflected in chapter three and four of this study.

It was found that although there are many barriers that impede access to justice, language barrier overrides all other barriers. It was therefore found that the language barrier is indeed inherent in the legal framework that governs language of the law and the courts, which is bilingual in nature as it allows the use of English and Kiswahili. Nevertheless, the law also permits the use of "other language" in District and Resident Magistrates' Courts where circumstances allow. Notably, there is no case that was in this study found where such "other language" was used in the district court and/or resident magistrates' court proceedings.

Since Tanzania is multilingual, it means that the potential for language barrier involving languages other than Kiswahili and English is significantly high. Such barrier is apparent and occurs in appropriate circumstances which would mandate the need for an interpreter who is not only fluent in Kiswahili but also the other language. It was found that court proceedings are largely conducted in Kiswahili, and instantly taken, translated and recorded in English, which is the language of the court record. As the headache of such task is left to the presiding judicial officer who may neither be an expert in that aspect nor well facilitated to carry out the translation obligations, potentials for loss of evidence and distortion of witnesses' testimonies are looming so to speak.

Effective recording is a product of effective listening. However, it is indeed, a painful process because of what the judicial officers undergo in recording the court proceedings. It is particularly so because this process involves (i) instant and manual

recording of what is being said by the litigants (ii) limited if not absence of room for judicial officers to consult and (iii) the language of court records which is English in courts other than Primary Courts as prescribed under the law. It therefore means that if the litigants provide their evidence in Kiswahili language, the presiding judicial officers must instantly and manually translate and record the evidence in English in the court proceedings. It is not uncommon to find proceedings and judgments containing many Kiswahili phrases, words and sentences suggesting that the presiding judicial officer could not instantly translate the same as he was taking the proceedings in court. Such practice violates the law on the language of court record. There were also notable instances of lack of precision in some court records.

This is particularly so and very challenging because to most judicial officers, English language is their second language or even a third language which means that language barrier is inherent in translating the proceedings from Kiswahili to English as pointed out above. At times, the court has raised concern on the problem of language barrier and suggested reforms that would allow taking and recording of court proceedings in Kiswahili. In this case, in order for any person to be able to record effectively and translate in this manner, he needs training and competence in the relevant languages of the court. Examination of the continuing judicial education for judicial officers did not reveal any training geared at eliminating such barrier other than an assumption that senior judicial officers are highly qualified for the duties they discharge.

Although there is a requirement for a presiding judicial officer to read the recorded evidence to a witness who adduced it and record any comment given by such witness

in relation to the record of his evidence, such requirement is not fully adhered to. It is common place for the magistrates' courts to just indicate that section 210 (3) of the Criminal Procedure Act [Cap. 20 R.E 2002] or rule 35(6) of the Primary Courts Criminal Procedure Code [Cap. 11 R.E 2002] has been complied with. As far as the District/Resident Magistrates Court is concerned, such practice does not reveal how the witness was informed of his rights and what his response was. Compliance with the provision would have helped to eliminate or reduce obvious errors resulting from instant translation and recording of testimonies of witnesses. The provisions are nevertheless limited to the reading of the evidence to the witness who adduced it. The provisions do not cover other parts of the court proceedings such as oral submissions given by litigants or their advocates and recorded by the court in the court proceedings. This study could not also find any corresponding provision applicable to the High Court as regard to reading of evidence to an accused person who adduced it.

Given the prevailing status quo as to the manner in which proceedings are conducted, it is clear that judicial officers presiding over cases need to be applauded for the work they do. Apart from the challenges imposed by the translation itself, they also lack an enabling or facilitative environment such as appropriate devices to facilitate them in recording court proceedings. The exception is the High Court (Commercial Division) where there are transcribers.

However, even these transcribers in the Commercial Court are claimed to be few and out-dated. In some instances, they fail to record some of the proceedings. The inference was drawn for this study from the foregoing including the instant

translation and manual recording of evidence that language barrier in court proceedings contributes to delays in disposing of cases. It was also found that the adoption of the procedure of filing affidavit evidence in chief of witnesses in place of oral testimonies in election petitions is a step in the right direction in eliminating loss of evidence through translation and delays in disposing of cases. However, such reform needs to be extended to other cases as recommended by the Law Reform Commission of Tanzania.

In addition, the courts do not have a pool of qualified interpreters readily available for engagement in court proceedings once a need arises as is with court assessors. This is a characteristic feature of all courts from the Primary Courts up to the Court of Appeal. More importantly, it is not the practice that matters of language barrier in court proceedings must be established during pre-trial hearings (preliminary hearing in criminal proceedings and pre-trial conference in civil cases) in both criminal and civil cases although the expansive construction of the law envisages the requirement.

As such, the language barrier issues always emerge as a surprise and dealt with in an ad hoc manner. It is common place for court/bench clerk and public prosecutors respectively to play the role of court interpreter, particularly with interpretation of charge sheet/information and statement of facts to accused persons in court proceedings. It was not surprising for the researcher to be asked to volunteer to offer interpretation services from Kiswahili to English and vice versa at the District Court of Bagamoyo. The extract of the relevant proceedings in which such services were rendered are appended herein. However, the experience was arduous since simultaneous interpretation does not involve any note writing and also much

concentration was required to ensure proper interpretation is done and control of the tone so as to bring the exact expression conveyed by the parties. Although the researcher is not a professional court interpreter who is specialised in this field, she was pleased to receive such opportunity which provided an in-depth understanding of what court interpreters experience during court interpretation and how they are usually picked.

The manner in which such interpreters are picked and selected is clear testimony of absence of a clear and comprehensive regime that governs interpretation, engagement of the interpreters and conducts of the interpreters in all court proceedings. The lack of such regime is notwithstanding that interpretation is one of the oldest and widely accepted means of overcoming language barrier in court proceedings. A number of important aspects are therefore lacking in the scant and scattered provisions that are presently used in regulating court interpretation and translation as clearly shown in chapter four of this study. A few of them are worthwhile to be restated in this chapter.

There are neither clear prerequisite qualifications for appointment of interpreters nor details as to how interpretation should be conducted, monitored and controlled in court; let alone a clear statutory requirement that an interpreter must be impartial and the right of an accused or a litigant to object a court interpreter. It was found that the foregoing shortcomings suggest that the court can easily be misled if the interpreter is interpreting in a language which is unknown to the court and other officers of the court and where such interpreter creates or has interests of his own to serve in the case.

The study found instances where interpreters had potentials for or had interests of their own to serve in the cases. In the first instance the interpreter was a complainant and a witness. In the other instances the interpreter was a brother of the accused person. Such instances raise issues of impartiality of the interpreters in discharging their interpretation duties. The finding as to the absence of adequate facilities means that the evidence given in the source language (interpreted into the language of the court –target language by the court interpreter) is not recorded in any form be it in audio, video or writing. To be sure, practical mastery of the source and target languages, thorough knowledge of law as well as court procedures are required for court interpretation.

The scanty provisions for interpretation in court proceedings are in their details confined to the right of an accused to have an interpreter if he does not understand the language in which the evidence is given. More importantly, the provisions are only confined to interpreting and translating evidence in criminal and probate proceedings. The construction of such provisions suggests that the provisions are also not intended to cater for the entire court proceedings and oral court submissions. Interpretation/translation is a discipline by itself, one of its critical aspects is in the type of interpretation that could be applied in a particular context depending on the circumstances of each case.

The scant and scattered provisions on court interpretation apply only to interpretation and not translation. Apparently, there is no corresponding provision that regulates translation which is different from interpretation. The exception is in probate and administration as shown in chapter four, and perhaps the scant provision of section

173 (3) of the Evidence Act [Cap 6.R.E 2002].

Apart from interpretation and translation, other statutory means for overcoming language barrier which were found and discussed in this study include the requirement for magistrates to read the recorded testimony to the witnesses; avoiding technical terms in charge sheets / information; and the use of other language in District Court and Resident Magistrate Courts.

Chapter three of this study demonstrates the extent to which the essence of language as a medium of accessing justice is internationally recognised as language ‘‘fair trial rights’’ and how far international instruments have responded to language barrier. As to how language barrier manifests itself in the court and court proceedings was also addressed in chapter four and more so in chapter five. The manifestation of language barrier is arguably inherent in the regime that governs language use, the multilingual nature of the country and the co-existence of English and Kiswahili as languages of the court albeit in different context and status. The way language barrier manifests itself tends to result in failure of justice in varied ways as it was shown in chapter five of this study. In discussing such instances several cases were examined and analysed, so was the judicial response to language barrier.

From the decisions analysed, the failure to provide an interpreter in appropriate case is fatal to the proceedings and may on appeal lead to acquittal or retrial in criminal proceedings. The same is the position with the failure to provide interpretation in accordance with the law. There are however conflicting positions of law relating to the consequences of failure of an interpreter to take an oath and whether or not the

circumstances of each case may determine whether the proceedings were fatal as discussed in chapter five of this study.

Analysed cases in this study also suggest that language barrier may result in defective charge sheet/information and pleadings which may result in the accused person being acquitted, retrial, and striking out of cases in appropriate situations in criminal and civil proceedings. This is so when a relevant document is found by the court to be incurably defective. Furthermore, it was found that the law does not comprehensively deal with hearing and speech impairment in court proceedings. This weakness creates a potential for failure of the court to detect and properly deal with accused persons and litigants with hearing and speech impairment. Hence, a likelihood of miscarriage of justice to an accused person or a litigant with such impairments. One case that points to such miscarriage of justice was found and extensively discussed in chapter five of this study.

Despite the challenges judicial officers in Mainland Tanzanian courts are facing, they have over the years devised means of overcoming language barriers in addition to the statutory requirement for interpretation applicable in certain cases and context as shown above. The devised means include allowing parties to argue a case by way of filing written submissions, offering translation of pleadings to unrepresented parties, pronouncing in Kiswahili judgments/ruling written in English, using both Kiswahili and English in courts' record although the law only recognises English as the language of the court record in courts other than Primary Courts. In this regard, this study has also found that the law entitles an accused person to ask for a translated version of a decision that relates to his case where it is practical as

discussed in chapter five of this study. So far this study has found only one case in which the Court of Appeal issued a judgment in English along with its official Kiswahili translated version.

It was also found that the practice of pronouncing judgments/rulings and using both Kiswahili and English texts in the judgments/rulings violates the law that requires court records to be kept only in English language as pointed out earlier in this chapter. The most common problems in Primary Courts where Kiswahili is used as language of the court and court record are as follow. There is mixing of Kiswahili and English in the proceedings and judgment and recording proceedings and writing judgment without applying proper punctuation. The two common problems relate to language barrier and have a great chance to occasion failure of justice. The use of Kiswahili in the Primary Courts has over the years generated vocabularies and conceptual apparatus which assist the courts in the administration of justice. This development however has potential of misleading litigants and creating room for language barrier instances. To be sure, such Kiswahili court vocabularies are often not used in the same way and context as they are used in the communities. The use of English texts in Primary Courts' record also violates the law on the language of Primary Court record.

Although it has been argued that the use of Kiswahili would eliminate barriers because majority of people in Tanzania are familiar with Kiswahili, it has become clear that the multilingual nature of the country has potential for having people who have limited knowledge of Kiswahili. In fact, the cases analysed in chapter five indicated that some litigants, accused persons and witnesses could not follow

proceedings conducted in Kiswahili. This is particularly so for residents who reside in rural areas. In addition, in Tanzania there is diversity of people from foreign countries who are here in Tanzania for investment purposes, among other reasons. In fact, some of them are not conversant with languages of the court be it Kiswahili or English. As such, the use of Kiswahili is not by itself a panacea to the language barrier although realistically it may serve to reduce the problem significantly. It is a truism that majority of the people in Tanzania are conversant with Kiswahili.

The absence of adequate and effective means and facilities to deal with language barrier is notable. This study argues that it does not matter whether or not proceedings are conducted in Kiswahili or English. Rather, what matters is provision of adequate and effective facilities that would facilitate the overcoming of language barrier when it arises in court proceedings. They include carrying out of the interpretation as and when needed without occasioning any failure of justice; and ensuring that right to legal representation is attained to those who due to their limited financial means cannot afford to engage advocates of their own. Interestingly, the theories discussed in chapter two with the exception of Namakula's theory did not put any emphasis if at all on the necessity of provision of facilities for interpretation. The assumption underlying such theories is that the presence or absence of facilities in courts is not an aspect that needs to be considered in overcoming language barrier.

Certainly, inherent errors in the interpretation or translation process explained by Karton can also very well be dealt with by provision of adequate and effective facilities for interpretation and translation including a clear and elaborate legal regime to govern instances of interpretation and translation. In any event, it is a

truism that it is not every translation/interpretation that is characterised by errors which occasion failure of justice. In legal context, it is only an error that results in failure of justice that could matter. In practice, there are several circumstances that lead to possible errors as such occurrence would depend on circumstances of each case.

Elimination of such circumstances is all what is needed and could be achieved by provision of necessary facilities and a comprehensive regime for interpretation and translation. Considering that the English language use in law is comprised of legal jargons, it is the facilities which are required to facilitate the court as well as the court users as a holistic solution to the problem of language barrier. Examples to facilitate the courts are such as equipping them with qualified interpreters, electronic devices for court records, stenographers and transcribers and the like.[472]

Using local languages as contended by some scholars in courts processes provides not only a sustainable benefit in national cohesiveness for nation-building and cultural identity but also appreciation of one's basic and human rights as indelibly attached to access to justice and language fair trial rights envisaged under article 13(6) (a) of the Constitution. People who are subject to courts of law of all backgrounds will be able to perform better in court litigations with the use of language that they understand better. This path forward will contribute to our understanding of quality justice, peoples' confidence to the judicial organs and respect to their community as well as social equity. Provision of adequate and effective facilities will facilitate interpretation to those who do not understand

[472] Mwakajinga (n 19) 233.

Kiswahili. As such, a pragmatic approach is what is required to ensure justice is done to all.

The following figure summarises the findings of the study.

Figure 6.1: Summarises the Findings of the Study

Key:

1. Language of law
2. Language of the court record.
3. Co-existence of English and Kiswahili.
4. Legalese.
5. Illiteracy
6. Globalization and movement of people
7. Procedural and formalism
8. Poor interpretation legal regime
9. Instant manual translation and recording of proceedings conducted in Kiswahili
10. Language proficiency
11. Poor facilities and lack of interpreters

12. Legal representation
13. Plurality of language
14. Client – advocates communication

6.3 Recommendations

In addition to some recommendations flagged out in the conclusion, the following recommendations need also to be given. It has been found that the interpretation provisions only cater for evidence adduced in language not understood by an accused or his advocate in criminal proceedings. It has also been found that magistrates are only bound to read evidence recorded in court proceedings to the witness who adduced such evidence. Since evidence is just a small part of court proceedings, radical legislative reforms need to be made to provide for interpretation of not only the evidence but also other parts of court proceedings such as oral submissions given by or on behalf of the parties during the proceedings as far as it is relevant.

The reform should also provide for a requirement of the presiding judicial officer to read not only the evidence but also oral submissions made by accused persons or litigants or on behalf of accused persons or litigants during court proceedings. Such provisions should also apply to the High Court and where relevant to the Court of Appeal. However, provisions of modern and adequate facilities for recording of court proceedings will relieve judicial officers of the burden of instant and manual translation of recording court proceedings and reduce delays in disposal of cases. No doubt such reform and improvements will help in reducing if not eliminating loss of evidence and distortion of oral submissions resulting from instant translation and recording.

In addition to that, the proposal by the Law Reform Commission for the introduction of affidavit evidence in chief which has so far been adopted in election petitions should be adopted and applied to all cases. This will avert errors which may occur as a result of instant and manual translation of recording of oral testimonies of witnesses. Furthermore, this study recommends amendment of the law to provide room for the court to have discretion to choose the language of court record between Kiswahili and English in courts other than the Primary Courts depending on the circumstances of each case. Similarly, the law should be amended to allow the use of any other language in other courts other than the District/Resident Magistrates' Courts. In so doing, there should be a comprehensive guideline for the implementation of the law as to the use of other language.

Needless to say, the reform should make the law on interpretation to apply also in civil proceedings. Indeed, the reform should also aim at stipulating clear qualifications for court interpreters and translators including their corresponding ethical and impartiality attributes and registration requirements. The reform on translation of documents in all court proceedings would also need to provide for requirement of certification of a translation by affidavit as is in probate and administration proceedings.

Language barrier can be overcome by introducing a mechanism of establishing whether or not there is a potential language barrier that is likely to affect court proceedings at the trial whether or not such barrier is a result of disabilities. This could be introduced as a clear requirement during preliminary hearing in criminal proceedings and pre-trial conference in civil proceedings. In this respect, parties

would be required to inform the court whether they envisage any potential language barrier that needs to be addressed during the trial. With this procedure, it can be established well in advance that there are witnesses or litigants or accused persons who do not understand the language of the court. Such reforms are necessary as they signify a right step towards language fair trial rights as priority rights.

It was one of the findings of this study that some of the judicial officers are not knowledgeable in Kiswahili as a result they do fail to translate some Kiswahili words into proper English terminology and vice versa. To curb these defects, it is hereby recommended that judicial officers should have continuing judicial education and training in language proficiency and language soft skills. Surely, if a judicial officer is well trained in language proficiency and soft skills, then the challenges identified in chapter four and five will not happen and language barrier will be minimised as loss of translation and interpretation will be reduced significantly. In Primary Courts, the magistrates will record the proceedings adequately and hence at the appellate courts proceedings, there will not be serious difficulties in trying to make sense out of the Primary Court proceedings and judgments and rulings.

The training background of most lawyers does not expose them to effective communication skills. For example, soft skills such as active listening which enable one to become effective communicators in their careers and practice is hardly taught in LLB programmes of most universities. In addition to that, such training should also equip them with translation skills for they on daily basis translate evidence and witnesses testimonies into court records during the court proceedings. This is crucially important as the translation at the moment is conducted instantly which

denies them room to consult.[473]

It is now clear that Kiswahili is increasingly becoming the language of communication in court room and in conducting proceedings whilst English remains as a mere language of record. This is particularly the case where litigants are unrepresented or where only one of the litigants is unrepresented. This practice calls for the need for the Law Reform Commission to revive with rigour its project of translating more pieces of legislation into Kiswahili. Since its establishment in 1980 to date 2018, it is almost 38 years and it is only fifteen statutes that have been translated. The number of translated legislation does not match the years of the existence of the Commission.

Therefore, the recommendation of this study is that the mandate of the Law Reform Commission should be financially supported and its budgetary requirements should be more strengthened so that the translation processes of laws are adequately done without delays caused by financial constraints. Since the language of law is English and Kiswahili, it is high time that all laws were enacted in both English and Kiswahili as is in Rwanda where laws are enacted in French, Nyarwanda and English. Enacting legislation in both Kiswahili and English is something which is practical and long overdue and which will partly solve the issue of duplicating the task of either translating the law or interpreting them.

Once all laws are enacted in Kiswahili and English, it is hoped that money will be saved from the task of translating the same law into Kiswahili. Apart from saving

[473] See Communication Skills Syllabus of University of Dar es Salaam and Zanzibar University attached as APPENDIX No 5 of this study.

money, time will also be saved, once the law has been passed by the Parliament and written in Kiswahili there will be direct utilisation and consumption by the Public.[474] Not only that but also the Kiswahili translation will contribute to the development of Kiswahili legal terms and vocabularies that could be used and be applicable in law and court proceedings. Of significance to note is the fact that there is already in place a legal Kiswahili Dictionary which has significant amount of Kiswahili legal terms. This needs to be publicised and used in the continuing judicial education and training for judicial officers. To be sure, there is already a body of Kiswahili legal language that is emerging from the use of Kiswahili in Primary Courts. This could be harnessed and brought into use when enacting legislation in Kiswahili and shared and discussed during continuing judicial education and training programme.

Language is a pertinent subject for consideration in the judicial and reform context. The study reveals the inherent language barrier in court proceedings which could affect trial fairness. A commitment to guarantee trial fairness in court proceedings is therefore important and should entail commitment to address the language question, particularly by the courts. This is critical because presently the courts are seemingly not inclined towards addressing language fair trial rights as priority rights. In many instances, as it has been examined in this study, cases were not properly dealt with because the courts seem not to recognise and properly address language fair trial rights as priority rights. Yet, members of the community it deals with majority of them are harboured by high level of illiteracy, language barrier and can hardly afford

[474] There is no doubt that the main objective of translating laws is for easy understanding and usage by the members of public. It has been commented chapter four of this study that easy understanding of the law is an effective means for the administration of the law and the dispensation of justice since knowing ones rights begins with full understanding of the legal process.

to engage an advocate. It is therefore recommended that it is high time the courts become mindful of the community that it serves as this is consistent with the vision and mission of the Judiciary.[475] For instance, it is high time that a charge sheet/information and statement of facts drafted in English are simultaneously accompanied by official Kiswahili translation versions. The same should be the practice as was in the case of *Dibagula* discussed in chapter five of this study.

As pointed out above, language barrier can be overcome by employing qualified personnel to translate and interpret during court proceedings. At the moment, there is no proper mechanism in place which ensures availability of a qualified interpreter to interpret evidence where a party or his witness cannot understand the language used. The court interpreter has to be able to deal with complex language, ambiguous question, and slang. Poor interpretation can obviously affect a court's perception of a litigant, an accused or a witness. It is a field which one needs to have studied and specialised in as any other disciplines; otherwise, this may result to miscarriage of justice. This study recommends for paradigmatic change in courts. There is an urgently need for qualified interpreters in courts. They should be used prudently in courts to ensure accessibility to justice. To be an interpreter is not enough to speak well two languages. A trained interpreter must prepare to work in court environment and under specified court procedures. Consistent with the foregoing, a comprehensive legislation for language interpretation and translation needs to be enacted.

[475]The vision of the Judiciary is Timely and accessible justice for all. And the mission of the Judiciary is *to administer justice to all through timely provision of quality.*

BIBLIOGRAPHY

Abdulaziz, M. H. and Whiteley, W. H. (1971). *Tanzania's National Language Policy and the Rise of Swahili Political Culture Language Use and Social Change,* London: Oxford University Press.

Abenga, E. B. N. (2017). "Civil Practice and Procedure in Kenyan Courts: Does the Overriding Objective Principle Necessarily Improves Access to Justice for Litigants?" workshop held on 04th – 06th, November, 2005, Arusha, Tanzania.

Alidou, H. (2004). *Medium of Instruction in Post-Colonial Africa, Medium of Instruction Policies,* Mahwah, NJ: Lawrence Erlbaum Associates.

Allen, R. J. (2015). Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges', *Boston University International Law Journal,* 31(1), 217 -266.

Ardalan, S. (2015). Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation, *Journal of Law Reform*, 8(4), 1001-1038.

Ashipu, K. B. C. and Umukoro, G. M. (2014). A Critique of the Language of Law in Selected Court Cases in Nigeria, *Mediterranean Journal of Social Sciences,* 5(8), 622-626.

Austin, J. L. (1962). *How to Do Things with Words,* Cambridge: University Press Massachusetts.

Bacik, I. (2007). Breaking the Language Barrier: Access to Justice in the New Ireland, *Judicial Studies Institute Journal*, l(2), 109-123.

Barendrecht, M. and Giesen, I. (2016). 'How to Measure the Price and Quality of

Access to Justice*'* held in Paris, at the OECD Conference Centre, on 3-4 November, 2016.

Berk –Seligson, S. (1998). The Importance of Linguistics in Court Interpreting, *La Raza Law Journal*, l(2), 14-48.

Blommaert, J. (2005). Situating Language Rights: English and Kiswahili in Tanzania, *Journal of Sociolinguistics*, 9(3), 390-417.

Boshe, P. and Mbezi, P. (2013). The Value of Pro bono Services in Accessing Justice in Tanzania, *Open University Journal*, 4(2), 146-157.

Brock-Utne, B. (2005). *The Continued Battle over Kiswahili as the Language of Instruction in Tanzania, Languages of Instruction for African Emancipation*, Dar es Salaam: Mkuti Na Nyota.

Brock-Utne, B. (eds), (2003). *Language of Instruction in Tanzania and South Africa,* Dar es Salaam: E & D (LOITASA), Ltd,.

California Commission on Access to Justice, (2016. Language Barriers to Justice in California: A Report of the California Commission on Access to Justice, California.

Carmona, M. S. and Donald, K. (2017). 'Access to justice for Persons Living in Poverty: A Human Rights Approach', retrieved from; <http://ssrn.co/abstract=2437808>.

Charamba, T. (2012). "Challenging the Hegemony of English in Post- Independence Africa-An Evolutionist Approach', PhD Thesis, University of South Africa. Pretoria, South Africa.

Chynoweth, P. (2008). *Advanced Research Methods in the Built Environment*, London: Willey-Blackwell.

Danish Institute for Human Rights, (2017). Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid and Schemes Used in the Region and the Level of Cooperation and Coordination between the Various Actors, A Report by the Danish Institute for Human Rights, Based on Cooperation with the East Africa Law Society, retrieved from; www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_ africa _dec_2011_dihr_study_final.pdf , p 19.

Evans, J. and Perk, L. (ed), (1997). Legal Skills and System, London: Old Bailey Press.

FACEIT and ESRF, (2002). The State of Corruption in Tanzania, Annual Report, Dar es Salaam, Tanzania.

Galanter, M. (2004). Access to Justice in a World of Expanding Social Capability, *Fordham Urban Law Journal*, 37, 115-116.

Galanter, M. & Krishnan, J. K. (2003). *Empirical Approaches to the Rule of Law*, London: Stanford University Press.

Garner, B. A. (2009). *Black's Law Dictionary*, 9th edition, New York: Thompson-West.

Geminiani, V. (2008). Language Access in the Courts and Law Enforcement, *Management Information Exchange Journal*, 22(4), 36-39.

Ghauri, P. & Gronhaug, K. (2010). *Research Methods in Business Studies*, 4th Edition, London: Pearson Education.

Grabau, C. M., and Gibbons, L. J. (1996). Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation, *New Eng.. L. Rev.*, 30(1), 22.

Guruswamy, M., and Aspatwar, B. (2017). 'Access to Justice in India: The Jurisprudence (and Self-Perception) of the Supreme Court', retrieved on 09/08/2017 from; https://papers.ssrn.comat.

Harries, L. (1996). Language and Law in Tanzania, *African Law Journal*, 10, 164-167.

Henn, M. (2006). *A Short Introduction to Social Research,* London: Sage Publications.

Heyns, C. and Killander, M. (2010). *Compendium of Key Human Rights Documents of the African Union,* Fourth Edition, Pretoria: Pretoria University Law Press.

Heys, C. and Stefiszyn, K. (eds.), (2006). *Human Rights, Peace and Justice in Africa: A Reader*, Pretoria: Pretoria University Law Press.

Hoecke, V. (2011). *Methodologies of Legal Research Which Kind of Method for what Kind of Discipline?* Oxford: Hart Publishing.

Jagannath, M. (2011). Barriers to Women Access to Justice in Haiti, *Cuny Law Review*, 15, 27-52.

Janet, E., and Mosher, J. E. (2008). Lessons to Justice: Racialized Youths and Ontario's Safe Schools, *OSGOODE Hall Law Journal*, 46, 807.

Jennings, W. I. (1959). *The Law and the Constitution,* 5th edition, London: University of London Press.

Judicial Council of California, (2016). Court Language Access, Support Program, a meeting agenda retrieved on 17/09/2016 from; <http://www.courts.ca. gov/documents/cip-Self-Assessment-Qualifications.pdf> (Accessed).

Karton, J. (2008). Lost in Translation: International Criminal Tribunals and the

Legal Implications of Interpreted Testimony, *Vanderbilt Journal of Translational Law*, 41(1), 1-54.

Kawulich, B. B. (2005). Participant Observation as a Data Collection Method, Forum: Qualitative Social Research, *Open Journal Systems*, 6(2), 43.

Keulder, C. (1995). *Traditional leaders and rural development*, in D' Englebronner-Kolff, Hinz and Sidano (eds), Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authorities in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, workshop held on 15-16/11/1995, Windhoek: New Namibia Books.

Kothari, C. R. (1990). *Research Methodology: Methods and Techniques*, 2nd Revised Edition, New Delhi: Wishwa Prakashan.

Legal and Human Rights Centre, (2010). Tanzania Human Rights Reports 2009, Dar es Salaam, Tanzania.

Legal and Human Rights Centre, (2012). Tanzania Human Rights Report, Dar es Salaam, retrieved from; www.humanrights.or.tz.

Masabo, T. (1999). *Kiswahili Katika Elimu, Taasisi ya Uchunguzi wa Kiswahili*, Dar es salaam: Mkuki na Nyota.

Massay, G. E. (2013). 'Adjudication of Land Cases in Tanzania: A Bird Eye Overview of the District Land and Housing Tribunal', A Paper Prepared for Internal Reflections and Discussion at the Land Rights Research and Resources Centre, Dar es Salaam, Tanzania.

Mazrui, A. (2013). 'Language and the Rule of Law: Convergence and Divergence', retrieved on 12/08/2015 from; https://zelalemkibret.files.wordpress.com.

/2013/02/language_and_the_rule_of_law.pdf.

Mbogo, S. (2012). *Research Methodology,* The Open University of Tanzania, Directorate of Research and Postgraduate Studies, Excel Learning Pretoria: Pty. Ltd.

McConville, M. and Hong, W. (eds), (2010). *Research Methods for Law,* Edinburgh: Edinburgh University Press.

Michael, C. O., (2016), Communication of An Interpreter and Fair Trial under Nigerian Criminal Justice System, *International Journal of Legal Discourse*, 1(1), 213-233.

Mikkelson, H. (2000). Awareness of the Language and the Law and the Preservation of Register in the Training of Legal Translators and Interpreters, retrieved on 12/03/ 2013 from; [http://www.acebo.com/papers/ guorantr.htm].

Mirindo, F. (2004). Administration of Justice in Mainland Tanzania, Law Africa, Nairobi, 2014.

Mohammed, H. (2012). 'Language Challenges Faced by Tanzanian Law Students to Communicate,' *English India's First Magazine,* Legal and Corporate Affairs, 2012, p. 3.

Mukuyogo, M. C. (1991). Can Law be taught in Kiswahili? *Eastern African Law Review*, 18(2), 55-81.

Mwakajinga, A. N. (2002). *Court Administration and Doing Justice in Tanzania*, in Jones-Pauly, C., and Elbern, S.(eds), Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts, London: Kluwer Law International.

Namakula, C. S. (2014). *Language and the Right to Fair Hearing in International*

Criminal Trials, London: Springer.

Ndumbaro, D. 'Free Access to Law in Tanzania: A Myth or Reality?' retrieved on 12/11/2014 from; www.docstoc.com/docs/27594233/FREE-ACCESS-TO-LAW-IN-TANZANIA-A-MYTH-OR-RELAITY-By-Damas-Daniel-Ndumbaro-Esq-A-paper-to-be-presented-to-the-seminar-on-Law-via-Internet-to.

Ndumbaro, D. D. (2012). The Challenges Facing Law via the internet in Tanzania. Retrieved on 24/1/2013, from; http://www.blog.law.cornell.edu/lvi2012/presentation/the-challenges-facing-law-internet-in-tanzania/.

Nina, D. (1993). Community Justice in a Volatile South Africa: Containing Community Conflict, *Clermont, Natal, Social Justice*, 20(4), 129-143.

Odhiambo, K. (2013). Court Interpreters View of Language Use in Subordinate Courts in Nyanza Province, Kenya, *Theory and Practice in Language Studies*, 3(6), 910-918.

Othman, M. C. (2012). 'A Keynote Address by Honourable Chief Justice of the United Republic of Tanzania on the occasion of the Annual Conference of the Tanganyika Law Society', held in Arusha, 17/02/2012, Tanzania.

Owen, M. (2012). Creating an Independent Traditional Court: A Study of Jopadhola Clan Courts in Uganda. *Journal of African Law*, 56(2), 215-242.

Oxford Dictionary, (2010). *Oxford Advanced Learner's Dictionary*, 8th edition, Oxford: Oxford University Press.

Penal Reform International, (2000). *Access to Justice in Sub-Saharan Africa, the role of traditional and informal justice systems,* London: Astron Printers Ltd.

Peter, C. M. (2000). *Human Rights in Tanzania: Selected Cases and Materials,* Koln: Rudiger Koppe Verlag.

Peter, C. M. (2004). 'The Contribution of the Court of Appeal of Tanzania in the Maintenance and Safeguard of Rule of Law and Human Rights' A Paper Presented in the 25th Anniversary of Tanzania Court of Appeal, Dar es Salaam, Tanzania

Possi, A, (2014). 'Persons with Disability's Right to Work in Africa: A Comparative Study of Employment and Disability Laws, Policies and Relevant Institutional Mechanisms of Tanzania and Selected African States', PhD Thesis, Friedrich-Alexander-Universität Erlangen-Nürnberg. Erlangen, Germany.

Rashid, N. (2014). British Colonialism in East-Africa During Nineteenth Century, *IOSR Journal of Humanities And Social Science,* 19(3), 08-11.

Roy-Campbell, Z. M. and Martha, A. S. (1997). *Language Crisis in Tanzania: The Myth of English Versus Education.* Dar es Salaam: Mkuki Na Nyota.

Rwezaura, B. (1981). *Sheria Ya Ndoa Tanzania,* Dar es Salaam: Taasisi ya Uchunguzi wa Kiswahili.

Rwezaura, B. (1994). Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania, *African Law Journal,* 37, 30-45.

Rwezaura, B. (1997). *Why Kiswahili should be the Medium of Instruction,* in Zaline, M., Roy-Campbell, M., and Martha, A., Language Crisis in Tanzania, Dar es Salaam: Mkuki na Nyota Publishers.

Sachs, A. and Welch, H. (1990). *Liberating the Law: Creating Popular Justice in Mozambique*, London: Zed Books.

Saffari, A. J. (1996). *Prosecution and Defence of Criminal Cases*, Dar es Salaam: Huda Publishers.

Saffari, A. J. (2006). *Mashtaka ya Jinai na Utetezi*, Dar es Salaam: UWAVITA.

Salter, M. and Mason, J. (2007). *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research,* England: Pearson Education.

Shivji, I. G. (2001). Law and Access to Justice: Rhetoric and Reality, *East African Journal of Peace and Human Rights,* 7(1), 55-81.

Singh, R. (2012*). Legal Research Methodology*, *Central Law Agency*, special price, Allahabad, new books retrieved on 20/03/2017 from; https://www.allahabadlawagency.com.

Stephene, S. (2014). Institutional Constraints to Village Land Management in Tanzania, Policy Brief No. 1, retrieved on 20/03/2017 from; https://agriknowledge.org/downloads/9880vr023.

Thetela, P. (2003). Discourse, culture and the law: The analysis of crosstalk in the Southern African bilingual courtroom, *AILA Review*, 16(1), 78-88.

Twaib, F. (1997). *The Legal Profession in Tanzania: The Law and Practice,* Bayreuth: Eckhard Breitinger.

Tweed, H. (1960). The Continuing Education of the Complete Lawyer, *Wash Univ L.Q.,* 4(1), 317.

U.S. Department of State, (2010). Bureau of Democracy, Human Rights, and Labour, human rights report: retrieved from; <http://www.state.gov/ documents/organization/160147.pdf.

Udombana, N. (2006). The African Commission on Human and Peoples' Rights and the Development of Fair Trial Norms in Africa, *African Human Rights*

Law Journal, 6(2), 330-332.

United Republic of Tanzania, (1994). Report of the Presidential Commission of Inquiry into Land Matters, Ministry of Lands, Housing, and Urban Development, Government of United Republic of Tanzania, Dar es Salaam, Tanzania.

United Republic of Tanzania, (2013). "Law Reform Comission", Report of the Comprehensive Review of Civil Justice System in Tanzania, Dar es Salaam, Tanzania.

Van Grieken, A. M. (2008). 'Language and Power in the Courts of Tanzania- A Critical Discourse of 30 Land Case Judgments' PhD Thesis, University of Dar es Salaam, Tanzania.

Vapnek, J., Boaz, P., and Turku, H. (2016). Improving Access to Justice in Developing and Post Conflict Countries: Practical Examples from the Field, *Duke For Law and Social Change*, 8, 27-44.

Vibhute, K, & Aynale, F. (2009). *Legal Research Methods: Teaching Material*, retrieved on 31/07/2017 from; www.chilot.files.wordpress.com/2011 /06/legal-research-methods.pdf.

Watt, R. and Johns, F. (2012). *Concise Legal Research*, 6th Edition, New Delhi: Universal Law Publishing Co.

Williams, G. (2002). *Learning the Law*, 11th Edition, New Delhi: Universal Law Publishing.

Yusuph, K. (2006). Extortion in Education Sector and Response to Criminal Legal System in Tanzania- A Review, *Asia Pacific Journal of Education, Arts and Sciences*, 3(1), 56-63.